Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOHN B. BELL

Petitioner,

v.

STATE OF NEW YORK, CHEMICAL BANK and
CHASE MANHATTAN BANK, N.A.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN B. BELL
Petitioner, Pro Se
3400 Foxcroft Road No. 115
Miramar, FL 33025
(954) 447-0217

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53 pp

QUESTION PRESENTED

Whether the Circuit Court's dismissal of petitioner's appeal sua sponte, on the ground that it was frivolous within the meaning of 28 U.S.C. §1915(d)(2)(B)(i), constituted an unacceptable deviation from the usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory powers.

LIST OF PARTIES

All parties hereto appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John B. Bell, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeal for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (2d Cir Oct. 16, 2001) is unreported and is reproduced in the Appendix at App.-1. The District Court's opinion (S.D.N.Y. Sept. 7, 2000) is unreported and is reproduced in the Appendix at App.-3. The Court of Appeals' Order (2d Cir. Feb. 21, 2002) is unreported and is reproduced in the Appendix at App.-17.

STATEMENT OF JURISDICTION

The Court of appeals decided my case on October 16, 2001 and the time in which to file a writ of certiorari was extended by the Honorable Justice Ginsburg, to and including July 22, 2002, on May 8, 2002 in Application No. 01A856.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1, 14th Amend. U.S. Constitution.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. §1983

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another,

for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. 42 U.S.C.§1985(3)

STATEMENT OF THE CASE

This is a Title VII action filed in the United States District Court, for the Southern District of New York, for violations of petitioner's constitutional rights to Due Process and the Equal Protection of the law, in a State Court action entitled Bell v. New York Higher Education Assistance Corporation, Chemical Bank and New York Law School, 138 Misc.2d 936, 526 N.Y.S.2d 319 (Sup.Ct. N.Y. Co. 1987) The State Court action against Chemical Bank (now Chase Manhattan Bank and hereinafter "Chase") was disposed of by the Court's initial Order, dated December 7, 1987 ("Decision"), granting Chase summary judgment dismissing the case on the ground that petitioner breached his Guaranteed Student Loan Contract, by failing to return to school within the time specified by 8 NYCRR 2104.4, (eff. 4-12-75 and repealed 9-11-96 and hereinafter "Rule").

I. The Unresolved Issues Presented In This Case

Subsequent thereto, petitioner moved pursuant to New York's Civil Practice Law and Rules ("hereinafter "CPLR"), §5015(a)(2) and (3), for the vacatur of the aforesaid Order, on the grounds that the Rule was unconstitutional because it was promulgated in excess of the rule-making authority granted New York State Higher

Education Services Corporation (New York Higher Education Assistance Corporation's successor and hereinafter "NYSHESC"), constituted an unlawful exercise of legislative power and had been unlawfully and retroactively applied ("Unresolved Issues"). The State Supreme Court *refused* to determine the Unresolved Issues and gave the Decision *res judicata* effect.

II. The District Court Dismissed The Complaint, Holding That It Lacked Jurisdiction To Hear The Case, Under The Rooker-Feldman Rule.

The District Court dismissed petitioner's complaint, *characterizing* it as a thinly disguised attempt by petitioner to seek federal review of a State court decision. However *inartfully* the complaint may have been drafted, it is clear enough to establish that petitioner is not seeking a review of anything the State Supreme Court *did*, but is complaining about what said Court *refused to do*. In the instant case, there is *no* state court decision adjudicating the Unresolved Issues.

Petitioner's Complaint sought the redress of grievances, based upon the denial of his constitutional rights. The historical background given the District Court to frame the circumstances in which these constitutional violations arose, was misconstrued by said Court as being the predicate upon which the case was based. However, incorporated into each Cause of Action by reference, are the allegations

contained ¶¶11, 12 and in the first ¶13 of the Complaint (inadvertently there are two ¶13s).

Paragraph 11 addresses petitioner's CPLR, §5015(a)(2) and (3) motion to vacate the Decisions, on the grounds that NYSHESC had repeatedly submitted perjurious affirmations, alleging that it was a State agency, in order gain and maintain the vacatur of petitioner's Jury Award against it. It further alleged that the summary judgment granted to Chase should be vacated because the provisions of the Rule had been unlawfully and retroactively applied.

In support of said motion, petitioner submitted a letter from State Senator Paterson's Office, advising petitioner that NYSHESC was not a State agency, but a Public Benefit Corporation and a copy Education Law, §216-a, which *statutorily* established that NYSHESC *was not* a State agency and was subject to New York's Not-For-Profit Corporation Law. As to Chase, petitioner submitted a copy of the Rule and a copy of his HE 700, which irrefutably established that the HE 700 was executed on *January 5, 1977* and that the Rule became effective on *April 12, 1977.*

Paragraph 12 of the Complaint addresses a subsequently filed §5015 motion seeking the same relief, on the same grounds. In support of that motion, petitioner submitted NYSHESC's Departmental Bill No. 388, in which it *admitted* that on *April 4, 1985* (more than two years *before*

the State Supreme Court's ruling, in an unpublished case) *the* New York Court of Claims *ruled* that NYSHESC *was not* a State agency. NYSHESC further admitted therein, that the said Court had taken that position *on a number of occasions*, "the last as recently *as September, 1986"*. These admissions were *corroborated* by the Attorney General of the State of New York, in comments sent to then Governor Mario Cuomo, in a letter dated July 11, 1990.

Petitioner further alleged therein, that the Rule was facially unconstitutional, because it was promulgated in violation of existing law (Education Law, §683[1]) and therefore, constituted an unlawful exercise of legislative power by NYSHESC. The State Supreme Court refused to adjudicate the aforesaid issues (hereinafter "Unresolved Issues"), giving the Decision res judicata effect.

Petitioner filed suit in the District Court under, inter alia, 42 U.S.C. §§1983 and 1985, alleging that his constitutional rights to Due Process and the Equal Protection of the Law were violated in the State Action, when Chase interfered with the adjudicatory functions of the State Supreme Court, by misrepresenting that the Decision constituted a final order and that the Unresolved Issues were therefore barred under the principles of *res judicata*.

The District Court dismissed the Complaint, characterizing it as a thinly disguised attempt by petitioner to obtain a federal review of a state decision, such review being prohibited under the Rooker-Feldman Rule. The District Court's *dicta*, at Footnote 7 of its Opinion, states:

> "Assuming arguendo that this Court were to find that it did have subject matter jurisdiction over plaintiff's claims, the claims as against NYS would be barred by the Eleventh Amendment *and the claims against Chemical and Chase would be precluded by the doctrine of res judicata.*". (App. at A-18.)

Petitioner appealed the District Court's dismissal of the Complaint. The Circuit Court, pursuant to 28 U.S.C. §1915(d)(2)(B)(i), dismissed the appeal *sua sponte*, finding that the appeal was frivolous. Petitioner now seeks a Writ of Certiorari to the Circuit Court, for the reinstatement of the appeal, so that the issues herein may be fully litigated.

REASONS FOR GRANTING THE PETITION

The record herein irrefutably establishes that the dismissal of the appeal, on the established facts and law, was inconsistent with, and deviated from, the usual course of judicial proceedings.

In the State Action, the State Supreme Court unlawfully gave the Decision *res judicata* effect and then agreed with Chase that the litigation of the Unresolved Issues was barred under the principles of res judicata. Chase knew, at the time it advanced this argument, that under New York State's Law of Res Judicata, there was no rational basis for such an argument.

I. Under New York State Law, CPLR, §5015 Permits A Litigant To Move To Vacate An Order Or Judgment, Where There Is A Change In Circumstances

New York State implemented the Civil Practice Law and Rules (hereinafter "CPLR"), specifically §5015 thereof which provides, in relevant part, as follows:

> **"Relief from Judgment or Order.**
> (a) On motion. *The court which rendered a judgment or order may relieve a party from it upon such terms as may be just*, on motion of any interested person with such notice as the court my direct upon the ground of:...".

CPLR, §5015, goes on to state that such relief may be granted for 1) excusable default, 2) newly discovered evidence, 3) fraud, misrepresentation or other misconduct of an adverse party, and 4) lack of jurisdiction and/or reversal, modification or vacatur of a prior judgment or order upon which it is based.

Petitioner's Unresolved Issues were raised by motions made pursuant to CPLR, §5015(a)(2) and (3). The State Supreme Court refused to decide the issues raised on said motions, holding that it constituted an attempt by petitioner *to start a second round of litigation of the issues it had initially determined.* The absence of an order deciding the Unresolved issues, is *prima facie evidence* that petitioner's claims cannot be *inextricably intertwined* with any state-court order or judgment. Chase's admissions, that these Unresolved Issues *were never adjudicated,* should have been dispositive of this issue. In its letter of February 2, 1999, responding to petitioner's request for a copy of the order adjudicating the Unresolved Issues, Chase states that:

> "...The orders you cannot "find", in which these matters were finally and legally determined, ***are in Justice Wilk's original decisions and the affirmations thereof.***" (emphases added)

Chase then goes on to demonstrate the fallacies in its arguments for res judicata treatment for the Decision , by exposing the lack of its compliance with the requirements of *res judicata*. It continues, stating that:

> "... Res judicata principles in New York establish that *these decisions resolve all legal bases you could or can ever have to contest the underlying student loan claims* supposedly arising in the 1970's, which you have attempted to relitigate for more than a decade. *Those decisions were final determinations of your claims*, whether or not they addressed any specific legal theories (which, of course, they could only do to the extent that you raised them). Your"constitutional" are simply another legal theory, *which you cannot raise once a final determination has been made*, as it was twelve years ago, on the underlying claim. ...".(Chase letter of. 2/2/99)(emphases added)

This latter portion of Chase's discourse is *patently absurd*. It had to have known, when it made these assertions, that they had no basis either in fact or in law. The most essential requirements for the invocation of defense of res judicata, are that the must be two separate proceedings, an identity of issue, and a final judgment on the merits. None of these essential element have been established.

II. Under New York State Law, Only A Valid Final Judgment Can Be Given Res Judicata Effect

CPLR,, §5015 debunked Chase's contention that the Decision was a "*final determinations of your claims*, whether or not they addressed any specific legal theories". Or that my "constitutional" [issues] were simply another legal theory, *which you cannot raise once a final determination has been made* ". Chase's arguments would hold water only in a subsequently brought proceeding, seeking to adjudicate the Unresolved Issues. Res Judicata specifically provides *that there must be two separate proceedings* between the identical parties or their privies, the claims sought to be barred must *have been determined in the prior proceeding*, and a valid final judgment on the merits entered. Chase has not bourne this burden of proof.

The Seventh Circuit, in *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502 (C.A. 7th Cir. 1993), dealt with a similar issues. The plaintiffs argued that the Tax Court's initial ruling had *res judicata* effect. The Seventh Circuit disagreed and held that:

> "[4-5] The taxpayers' alternative suggestion, that the Tax Court's initial ruling had res judicata (they mean collateral estoppel) effect *is frivolous*. Only a final judgment has such effect. *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28, 36 S.Ct. 447, 449, 60 L.Ed. 868 (1916); 18 Charles Alan

> Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedures, §4432 (1981). ...
>
> *There is no basis for using res judicata or collateral estoppel to prevent a judge from reconsidering an earlier ruling in the same on-going case.*" (id. P. 504)(emphases added.)

The Appellate Division, First Department, took a similar position in *Brown Avenue Realty Corp. v. Rubin*, 207 A.D.2D 263, 615 N.Y.S.2d 360 (A.D. 1st Dept. 1994), when it held that:

> "We agree with the Supreme Court that the plaintiff's claims are not barred by res judicata. Pursuant to the transactional analysis approach, which this State has adopted in deciding res judicata issues, '*once a claim is brought to a final conclusion*, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 68, 429 N.E.2d 1158; *see also Matter of Reilly v. Reid*, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 379 N.E.2d 172). The doctrine bars not only claims that were actually litigated but also claims that could have been litigated (*Nottenberg v. Walber 985 Co.*, 160 A.D.2d 574, 575, 554 N.Y.S.2d 217). *The previous*

> *disposition must have been on the merits and the party opposing preclusion must have had a full and fair opportunity to litigate his claim in the prior proceeding (see, Schwartz v. Public Administrator*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725; *Murray v. National Broadcasting Co.*, 178 A.D.2d 157, 576 N.Y.S.2d 578, appeal dismissed 79 N.Y.2d 1-36, 584 N.Y.S.2d 442, 594 N.E.2d 936; *Brugman v. City of New York*, 102 A.D.2d 413, 477 N.Y.S.2d 636, affd. 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195." (id. p.)(emphases added)

The fact therein should have precluded the entry of the injunction enjoining petitioner from further litigating, on the ground that such litigation was barred under the principles of *res judicata*.

II. Under New York State Law, Only A Final Judgment May Be Given Res Judicata Effect

Additionally, as indicated hereinabove, under New York State law, only a final valid judgment may be given res judicata effect. Contrary to Chase's assertions, the Decision is not such a judgment, since it did not decide all the issues in the case. The New York State Court of Appeals defines what constitutes a final order, in *Burke v. Crosson*, 85 N.Y.2d 10, 623 N.Y.S.2d 534, 647 N.E.2d 736 on remand 213 A.D.2d

963, 623 N.Y.S.2d 969 app. and rearg. den. 1995 WL 350085, thus:

> "[1] The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing (see generally Cohen and Karger, Powers of the New York Court of Appeals, §9, at 39; Scheinkman, The Civil Jurisdiction of the Court of Appeals: The Rule and Role of Finality, 54 St. John's L. Rev. 443). Nonetheless, a fair working definition of the concept can be stated as follows: a final order or judgment is *one that disposes of all of the causes of action between the parties in the action or proceeding* and leaves nothing for further judicial action apart from mere ministerial matters (see generally Cohen and Karger, op. Cit. §§10, 11).

The Decision, *admittedly*, did not adjudicate the Unresolved Issues raised and therefore, by definition, is not a final Order. Since only valid final judgments, on the merits, can raise the bar or res judicata, then it is further evident that the Decision could not be used to raise a bar of *res judicata* to bar further litigation therein and most assuredly, cannot be raised to preclude the litigation herein..

III. The Circuit Court's Dismissal Of Petitioner's Appeal, Pursuant To 28 U.S.C. §1915(d)(2)(B)(i), Flies In The Face Of The Facts That Are Contained In the Record

I. The Rooker-Feldman Rule Is Not Applicable

The Rooker-Feldman Rule was never intended to extinguish constitutional rights, where federal law specifically states that they exist. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 20-21 (1986), Justices Blackmun, Brennan, Marshall, O'Connor, Scalia and Stevens, all joined in concurring opinions that rejected Pennzoil's contention that Texaco's federal suit was barred under the Rooker-Feldman Rule.

In his concurring opinion, Justice Scalia (joined therein by Justice O'Connor), wrote:

> "I join the opinion of the Court. I write separately only to indicate that I do not believe that the so-called *Rooker-Feldman* doctrine deprives the Court of jurisdiction to decide Texaco's challenge to the constitutionality of the Texas stay and lien provisions. In resolving the challenge, the Court need not decide any issue either actually litigated in the Texas courts or inextricably intertwined with the issues so litigated. Under these circumstances, I see no jurisdictional bar to the Court's decision in this case." (Id. p. 18)

Justice Brennan, in his concurring opinion (joined therein by Justice Marshall), wrote:

> "... Texaco filed this §1983 suit claiming only the violations of federal statutory and constitutional law. *In enacting §1983, Congress 'created a specific and unique remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding.'. Mitchum v. Foster*, supra, at 237. ...
>
> Furthermore, I reject Pennzoil's contention that *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), forbids collateral review in this instance. In *Rooker* and *Feldman*, the Court held that lower federal courts lack jurisdiction to engage in appellate review of state-court determinations. *In this case, however, Texaco filed the §1983 action only to protect its federal constitutional rights to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit.* Texaco's ~~federal~~ action seeking a stay of judgment pending appeal is therefore an action 'separable from and collateral to' the merits of the state-court judgment. *National Socialist Party v. Skokie*, 432 U.S.43, 44 (1977) (quoting *Cohen v. Beneficial Loan*

> *Corp.*, 337 U.S. 541-546 (1949)." (Id. p. 20-21)(emphases added)

Justice Marshall, in his concurring opinion, summed up this issue upon which the District Court dismissed the action originally, by restating the underlying principle of *Rooker-Feldman*, thus:

> "As we have said, "[i]f the constitutional claims presented to a United States district court are inextricably intertwined" with the merits of a judgment rendered in state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not do." District of *Columbia Court of Appeals v. Feldman*, *supra*, at 483-484, n. 16. While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that *the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it*." (Id. p. 25)(emphases added)

It is respectfully contended that the Circuit Court's dismissal of petitioner's appeal, pursuant to 28 U.S.C. § 1915(d), flies in the face of the facts and law contained in the record. 28 U.S.C. §1915(d) authorizes an

appeal court to dismiss an appeal, only when legal theory, or the factual contention therein *lacks an arguable basis.* In Neitzke v. Williams, 490 U.S. 319 (1989), this Court unanimously stated that the frivolousness standard under §1915(d) is met, "*only if the petitioner cannot make any rational argument in law or fact.*". (citing, *Estelle v. Gamble*, 429 U.S. 273 (1976); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and *Jones v. Alfred Mayer Co.*, 392 U.S. 409 [1968].)

In those cases, this Court concluded that it could hardly be said that the substantial legal claims raised therein were so defective, that they should never have been brought at the outset. It further concluded that to term such claims as frivolous, would distort measurably the meaning of frivolousness both in common and legal parlance.

The case at bar, not unlike those referenced above, raises substantial claims under federal statutory and constitutional law. The *prima facie* evidence adduced herein, irrefutably establishes that the instant action is not frivolous within the meaning of 28 U.S.C. §1915(d) and that the Circuit Court's action, in dismissing same, constituted an unacceptable deviations from the usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory power.

CONCLUSION

Predicated upon the foregoing arguments, petitioner respectfully contends the record herein establishes that the instant case contains meritorious claims under both federal statutory and constitutional law. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: 7/20/02

S.D.N.Y.
99CV5809
Schwartz, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for The Second Circuit, held in the United States Courthouse, Foley Square, in the City of New York, on the 16th day of Oct. Two Thousand One

Present:
Hon. Jon O. Newman,
Hon. Amalya L. Kearse,
Circuit Judges,
Hon. Gregory W. Carman,
Chief Judge, Court of Int'l Trade

John B. Bell,
Plaintiff-Appellant,

v.

State of New York, et al.,
Defendants-Appellees

SEAL
00-9311 U.S. Court of Appeals]
Filed Oct 16 2001
[Second Circuit]

Appellees have moved to dismiss the appeal and to stay the briefing schedule. Upon consideration of the motion, appellant's opposition to the motion, and the appellant's brief on appeal, it is hereby ORDERED that the motion to dismiss be and it is hereby granted pursuant to 28 U.S.C. § 1915 (d) (2) (B) (i) ("Notwithstanding any filing fee, or any portion thereof, that my have been paid, the court shall dismiss the case at any time if the court determines that ... the action or

appeal... is frivolous or malicious ...."); see, e.g., Pillay v. INS, 45 F.3d 14, 17(2d Cir. 1995) (court of appeals has inherent power to dismiss an appeal on the ground that it is frivolous when "no arguably meritorious issue" is presented for review, even if the appellant has paid the requisite appellate filing fees).

Appellees' motion to stay the briefing schedule is denied as moot.

THE MANDATE, CONSISTING OF ITEMS ELOW HAS BEEN RECEIVED,
( ) OPINION
( ) STATEMENTOF COSTS
( ) ORDER

FOR THE COURT
ROSEANN B. MacKECHNIE,
By:_____/S/_____
LUCILLE CARR

Received by: R.M. Date: 10/24/01
RETURN TO CIVIL TEAM

Oct 16 2001

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN B. BELL

Plaintiff,

-against-

OPINION AND ORDER

THE STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.

99 CIV. 5809 (AGS)

Defendants.

----------x

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

Plaintiff John B. Bell, proceeding pro se, brings this action pursuant to, inter alia, 42 U.S.C. § 1983, alleging violations of his constitutional right to due process and equal protection. Before the Court is (i) defendant State of New York's[1] ("NYS") motion to dismiss the complaint in its

[1] On a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(1), "a court must accept as true all material factual allegations in the complaint." Atlantic Mut. Ins. Co. v. Balfour MacLaine Intel Ltd., 968 F.2d 196, 198 (2d Cir. 1992). "In deciding the motion the Court may consider documents referenced in the complaint and documents that are in plaintiff's possession or that the plaintiff knew of and relied on in bringing suit." Bal v. NYC Loft Board, No. 00 Civ. 1112 (JGK) 2000 WL 890199,, *2 (Jul. 5, 2000) (Koeltl, J.). Additionally, in considering a motion to dismiss "it is proper to consider public documents ... to determine whether claims are barred by prior litigation." Bal, 2000 WL 890199, *2. Accordingly, the facts discussed herein are accepted as true

entirety pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) and 12(b)(6); (ii) defendant Chase Manhattan Bank, N.A. ("Chase") motion to dismiss the complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment as against Chase nad defendant chemical Bank (Chemical") pursuant to Fed. R. Civ. P. 56. For the following reasons, defendants' motion to dismiss the complaint is GRANTED and the plaintiff's cross-motion is DENIED.

BACKGROUND

A. Factual Background

Plaintiff is a former law student who obtained a student loan and then failed to discharge that debt. Defendants are (i) NYS; (ii) Chemical, from whom plaintiff obtained the student loan; and (iii) Chase, which has acquired Chemical and is now the real party in interest. (Complaint ¶¶ 3, 4.) This action arises out of a protracted dispute concerning whether Chemical submitted plaintiff's student loan to the New York Higher Education Assistance Corporation ("NYHEAC") for payment prematurely.

In fall 1975, plaintiff commenced his studies at New York Law School and borrowed monies from Chemical in

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for the purposes of this motion and are drawn from the allegations of the complaint or are otherwise reflected in the record.

order to finance his education. (State Court Complaint ¶¶ 8, 9 att. To Pl's App. Exhs.) In 1977, plaintiff took a leave of absence from law school.[2] When Chemical became aware that the promissory notes had matured and, when plaintiff failed to remit monies to discharge the debt, Chemical submitted the loan to NYHEAC for payment. (State Court Complaint ¶¶ 15, 16 att. To Pl's App. Exhs.)

In 1983, plaintiff, proceeding pro se, filed suit in New York State Supreme Court against NYHEAC, Chemical, and New York Law School alleging, inter alia, breach of contract. York State Supreme Court against NYHEAC, Chemical, and (Complaint ¶ 6.) Plaintiff contended that Chemical had submitted the loan to NYHEAC prematurely and wrongfully demanded repayment. The New York State Supreme Court dismissed the claims against New York Law School as time-barred. (Complaint ¶ 13.) On July 24, 1985, while plaintiff's state court action was still pending, plaintiff filed suit in federal court in the Southern District of New York against, inter alia, NYS and New York Law School. Plaintiff asserted claims under 42 U.S.C. §§ 1983, 1985, alleging that defendants had violated his constitutional right to due process by making fraudulent representations in state court concerning the applicability of the statute of limitations.

---

[2] Plaintiff never completed his coursework and, ultimately, failed to graduate

Judge Vincent L. Broderick dismissed the complaint, reasoning, inter alia, that plaintiff was impermissibly asking a federal court to review a state court judgment. See Bell v. State of New York, No. 85 Civ. 5639, at 14-19. The Second Circuit, affirming Judge Broderick's dismissal of the complaint, characterized plaintiff's arguments on appeal as being "the same frivolous points ... that he addressed in the district court." Bell v. State of New York, No. 85 Civ. 7893 (2d Cir. Mar. 23, 1986) (unpublished).

In 1987, a brace of decisions issued with respect to plaintiff's pending state court action. The New York State Supreme Court dismissed plaintiff's claims against NYHEAC for lack of subject matter jurisdiction, see Bell v. NYHEAC, 526 N.Y.S.2d 316 (Sup. Ct. 1987), reh'g denied, 533 N.Y.S.2d 642 (Sup. Ct. 1988), and granted Chemical summary judgment against plaintiff, see Bell v. NYHEAC, 526 N.Y.S.2d 319 (Sup. Ct. 1987). Plaintiff appealed to the Appellate Division and the New York Court of Appeals, to no avail. See, e.g., Bell v. NYHEAC, 526 N.Y.S.2d 316 (App. Div. 1987) (affirming grant of summary judgment to Chemical) appeal dismissed in part denied in part 541 N.Y.S.2d 979 (1989); Bell v. NYHEAC, 533 N.Y.S.2d 642 (App. Div. 1988) (affirming dismissal for lack of subject matter jurisdiction) appeal dismissed 537 N.Y.S.2d 493 (1989) appeal denied 541 N.Y.S.2d 984 (1989) reargument

denied 543 N.Y.S.2d 401 (1989); Bell v. NYHEAC, 538 N.Y.S.2d 451 (App. Div. 1988) (affirming denial of rehearing on dismissal for lack of jurisdiction) appeal dismissed in part, denied in part 541 N.Y.S.2d 979 (1989).

Despite having exhausted his appeals, plaintiff nevertheless continued to litigate. In 1989, the New York State Supreme Court (i) denied plaintiff's motions for recusal and for an order to deem the court's earlier decisions abandoned and (ii) enjoined plaintiff from making further motion without the court's permission. The Appellate Division unanimously affirmed, stating that "in light of plaintiff's palpable abuse of the judicial process, the court was well within its discretion in requiring that plaintiff obtain the court's permission before making any further motions." Bell v. NYHEAC, 560 N.Y.S.2d 439,, 440 (App. Div. 1990)[3] Dismissing plaintiff's motion for leave to appeal, the New York Court of Appeals imposed sanctions on plaintiff, referring to plaintiff's "abuse of judicial process" and to the fact that "this is the fifth motion in a chain reflecting a strategy of dilatory, frivolous avoidance of a twenty-year old student loan debt for two years' law school education". Bell v. NYHEAC, 563 N.Y.S.2d 54, 54 (1990), reargument

[3] Additionally, the Appellate Division unanimously affirmed a New York State Supreme Court decision denying plaintiff's motion for reargument. See Bell v. NYHESC, 550 N.Y.S.2d 712 (App. Div. 1990), appeal dismissed 560 N.Y.S.2d 129 (1990)

denied, 565 N.Y.S.D. 764 (1990). Following these adverse decisions, plaintiff spent several years unsuccessfully petitioning the state courts for permission to file motions. (Complaint ¶¶ 11, 12 13.)

In 1997, the New York State Supreme Court (i) granted Chemical's motion to permanently enjoin plaintiff from commencing or reinstituting further litigation relating to his studen; and (ii) denied plaintiff's cross-motion for, inter alia, vacatur of the decisions dismissing NYHEAC from the action and granting summary judgment to Chemical, which had been rendered a decade earlier. The Appellate Division unanimously affirmed, finding that "plaintiff's claims are barred by the doctrine of res judicata" and that it was appropriate to enjoin plaintiff from further litigation relating to his student loans "in view of plaintiff's dilatory and frivolous tactics over the long history of this litigation". Bell v. NYHEAC, 671 N.Y.S.2d 975, 975-76 (App. Div. 1998), appeal dismissed, 677 N.Y.S.2d 783 (1999), appeal and leave to appeal dismissed, 691 N.Y.S.2d 384 (1999).

B. Procedural History

On July 21, 1999, approximately two months after the New York Court of Appeals dismissed plaintiff's final appeal of the order permanently enjoining him from commencing further litigation, plaintiff filed the instant action. Plaintiff

asserts claims under, inter alia, 42 U.S.C. § 1983, alleging violations of his constitutional right to due process and equal protection. Specifically, in claim one plaintiff alleges that his right to due process and equal protection was violated when NYS, in order to unlawfully influence the state court's adjudication of plaintiff's claims, deliberately and disingenuously failed to respond to certain of plaintiff's arguments. In claims two through fifteen, plaintiff alleges that his right to equal protection was violated by certain fraudulent and unlawful contentions that Chemical and Chase advanced in order to interfere with the adjudicatory function of the state courts. Plaintiff seeks $49 million in damages and a determination as to whether a certain regulation, 8 N.Y.C.R.R. § 2104.4, which has been repealed, was constitutional when it was in effect.

On October 29, 1999, defendants filed the instant motion to dismiss under Fed. R. Civ. P. 12 or, in the alternative, for summary judgment under Fed. R. Civ. P. 56, and plaintiff filed a cross-motion for partial summary judgment.

DISCUSSION

I. LEGAL STANDARD GOVERNING MOTION TO DISMISS PURSUANT TO 12 (b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), "a court must accept as true all material factual allegations in the complaint." Atlantic Mut., 968 F.2d at 198; see Hernandez v. City of New York, No. 98 Civ. 7237 (AGS) 2000 WL 145749, *1 (S.D.N.Y. Feb 7, 2000). However, argumentative inferences favorable to the party asserting jurisdiction should not be drawn." Atlantic Mut., 968 F.2d at 1989; see Hernandez, 2000 WL 145749, *1. Where, as here, the plaintiff is proceeding pro se, courts must apply a "more flexible standard in determining the sufficiency of [the] complaint that they would in reviewing a pleading submitted by counsel." Platsky v. CIA, 953 F.3d 26, 28 (2d Cir. 1991) (per curiam); see Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO THE ROOKER-FELDMAN DOCTRINE

NYS moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1), alleging that the Court lacks subject matter jurisdiction under, inter alia, the Rooker-Feldman Doctrine.[4] "Under the Rooker-Feldman doctrine, a federal

[4] It is unclear whether Chase and Chemical join in NYS's motion to request dismissal pursuant to Fed. R. Civ. P. 12(b)(1) under such doctrine. However, subject matter jurisdiction may be raised by a court

district court does not have subject matter jurisdiction over [an action] that seeks to review a state court decision." Bal, *3; see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) (holding that the U.S. Supreme Court is the only federal court that can entertain a direct appeal from a state court judgment); Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996); cf. 28 U.S.C. § 1257.[5] The Supreme Court has stated that even where a state court judgment is not being appealed directly, "the District Court is in essence being called upon to review the state court decision" where "claims presented to a United States District Court are inextricably intertwined with the

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sua sponte. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (stating that a court has an independent duty to examine the basis for jurisdiction); Genter v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995) (stating that a challenge to subject matter jurisdiction may be raised at any time by either party or sua sponte by the court); Hernandez, 2000 WL 145749, *1 (same). Accordingly, regardless of whether Chase and Chemical join in NYS's motion, the Court must examine whether it has jurisdiction over the claims asserted against each of the defendants, not only those claims asserted against NYS. Cf. Dockery v. Cullen & Dykman, 90 F. Supp.2d 233, 237 (E.D.N.Y. 2000) (dismissing action as to all defendants, even non-moving defendants, on the ground that Rooker-Feldman doctrine was a jurisdictional doctrine that could be invoked by the court sua sponte).

[5] Federal district courts may review final state court decisions in certain exceptional instances, for example, if a federal statute so provides. See, e.g., 28 U.S.C. § 2254 (governing petitions for writs of habeas corpus); cf. Saint-Fleur v. City of New York, No 99 Civ. 10433 (WHP), 2000 WL 280328, *6 (S.D.N.Y. Mar. 14, 2000). However, such exceptions are inapplicable here.

state court's [determination]." Feldman, 460 U.S. at 483 n. 15 (citations omitted) (emphasis added).

A federal claim is "inextricably intertwined" with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring); accord Dockery, 90 F. Supp.2d 236; cf. Hachamovitch v. Debuono, 159 F.3d 687, 693 (2d Cir. 1998) ("The Rooker-Feldman doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment.") "[E]ven if the state court judgment was wrongfully procured, it is effective and conclusive until it is modified or reversed in the appropriate State appellate or collateral proceeding." Dockery 90 F. Supp.2d 236 (quoting Simpson v. Putnam County Nat'l Bank, 20 F. Supp.2d 630, 633 (S.D.N.Y. 1998) (citation omitted)); see Mcallan v. Malatzky, No 97 Civ. 8291 (JGK) 1998 WL 24369, *2 (Jan. 22, 1998) (stating that "even though the [state court] judgment may rest on an erroneous resolution of constitutional federal law issues", a district court has no jurisdiction to review and reverse it) (Citations omitted) aff'd 1999 WL 146300 (2d Cir. 1999) (unpublished) Therefore, "the fact that the plaintiff alleges [in federal court] that the

State court judgment was procured fraudulently does not remove his claims from the ambit of Rooker-Feldman." Dockery, 90 F. Supp.2d at 236 (quoting Smith v. Weinberger, 994 F. Supp 418, 424 (E.D.N.Y. 1998) (emphasis added); see also Johnson v. The Smithsonian Institute, 189 F.3d 180, 186 (2d Cir. 1999) ("This court has never recognized a blanket fraud exception to Rooker-Feldman.").

Here, plaintiff's claims are "inextricably intertwined" with the state court judgment because the essence of plaintiff's claim is that the state court judgment was "procured fraudulently". *Dockery*, 90 F. Supp2d at 236. The claims allege that the defendants have "willfully and unlawfully interfered with the adjudicatory function of the state courts" by advancing or failing to advance certain contentions in the state court proceedings. (See, e.g., Complaint ¶¶ 18, 20.) Specifically, the first claim alleges that NYS unlawfully interfered with the state court adjudication by deliberately and disingenuously failing to address plaintiff's constitutional challenge concerning a certain regulation that allegedly was pivotal to determining whether summary judgment should have been granted to Chemical. (Complaint ¶¶ 15, 16; Pl's Mem. Law Opp. State's Mot. At 1.) Other claims allege that Chemical unlawfully interfered with the state court adjudication by deliberately

advancing misleading contentions concerning the applicability of 8 N.Y.C.R.R. § 2104.4 and the relationship between a certain document, HE 700, and the promissory note at issue. Additional claims allege that Chase unlawfully interfered with the state court adjudication by (i) adopting, as Chemical's successor, Chemical's fraudulent contentions; and (ii) colluding with the Attorney General in inaccurately contending that the doctrine of res judicata was applicable. Plaintiff, in alleging that defendants misleadingly remained silent or fraudulently advanced certain arguments with the intent of unlawfully interfering with state court adjudication, implicitly asks this court, in contravention of the Rooker-Feldman doctrine, to reverse the state court's judgment. See Drew v. Chase Manhattan Bank, No. 95 Civ. 3133 (JGK), 1998 WL 430549, *6 (S.D.N.Y. Jul. 30, 1998) (Koeltl, J.) (Moreover, the plaintiff's allegation that the second state court foreclosure judgment was procured by fraud ... was merely a thinly veiled effort to invalidate a State Court foreclosure judgment, in contravention of Rooker-Feldman.") (citing Smith, 994 F.2d at 424) (internal quotations marks omitted); cf. Simpson, 20 F. Supp.2d 630 (finding that, where addressing the claim would require that the court revisit the state court's foreclosure judgment and declare that judgment invalid on account of fraud, the court lacked jurisdiction). Consequently, plaintiff's claims alleging that the state court

judgments were wrongfully procured are barred by the Rooker-Feldman doctrine. See Zipper v. Todd, No. 96 Civ. 5198, 1997 WL 181044, at *6 (S.D.N.Y. 1997) (finding that the court lacked jurisdiction to decide a claim that alleged that the defendant had obtained the state court's approval for a liquidation by perpetrating a fraud); Levitin v. Homburger, 932 F. Supp. 508, 518-19 (S.D.N.Y. 1996) (finding that the court was without jurisdiction to decide a claim that alleged that a defendant had obtained a foreclosure judgment from the state court by perpetrating a fraud), aff'd, 107 F.3d 3 (2d Cir. 1977).[6]

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[6] The Court notes that in plaintiff's section 1983 suit before Judge Broderick 15 years ago, discussed supra, plaintiff asserted precisely the same type of allegation that it asserts in the instant action: that the state court judgment was fraudulently obtained. Judge Broderick dismissed the complaint on the grounds, inter alia, that plaintiff was impermissibly attempting to transform the federal district court into an appellate court reviwing allegedly fraudulently obtained state court judgments.

Judge Broderick dismissed the complaint for reasons stated on the record at a hearing on October 17, 1985. See Bell v. State of New York, No. 85 Civ. 5693 (VLB) (S.D.N.Y. Oct. 22, 1985). At the October 17, 1985 hearing, Judge Broderick stated in pertinent part:

What is involved here shortly and simply is that the plaintiff asserted legal claims in the state, he lost those legal claims, and now asserts the fact that he lost those legal claims constituted action by the State of New York depriving him of due process and of equal protection. No matter how it is couched, what plaintiff is seeking is to use the civil rights laws to constitute this court a Court of Appeals over what the state court has done.

With respect to the claims against the New York Law School ... plaintiff alleges a series of conspiracies, some 13 different conspiracies ... to commit a fraud on the state court by arguing ... that

Further, the fact that plaintiff alleges that his civil rights have been violated is insufficient to shield a claim from Rooker-Feldman where plaintiff is in actuality seeking review of a state court judgment. See Brooks-Jones v. Jones, 916 F. supp. 280, 281 (S.D.N.Y. 1996) ("A plaintiff also may not seek a reversal of a state court judgment simply by casting [her] complaint in the form of a civil rights action.") cf. Anderson v. Bowen, 881 F.2d 1, 5 (2d Cir. 1989) (stateing that constitutional claim is insufficient to confer jurisdiction where such a claim appears to be a state court claim "recloaked in constitutional garb"). A section 1983 claims seeks review of a state court judgment where, as here, the alleged constitutional violation arise out of the state court proceeding. This is because addressing such violations necessarily requires that the district court review the validity of the state court judgment. See Drew, 1998 WL 430459, *5 (finding that a section 1983 claim alleging due process violations was barred where plaintiff alleged that violations stemmed from fraudulent representations made by defendants in a state court proceeding, reasoning that "to remedy

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the plaintiff's claims were extinguished by the statute of limitations ... Here again, the plaintiff lost a legal action in the state; he appealed; the result in the trial court, in Special Term Part 1, was affirmed on appeal; and so now he is attempting to try the matter again in this court. ... Plaintiff is purely and simply a disappointed litigant.
(Transcript of Hearing, dated October 17, 1985, No. 85 Civ. 5639, at 14-19) (emphasis added). For the same reasons, this action must likewise be dismissed.

[plaintiff's] injuries, this court would be required to review that judgment or to readjudicate [plaintiff's] claim that defendants miscalculated and misapplied her mortgage payments."): Mcallan, 1998 WL 243269, *3 (finding that a section 1983 claim alleging due process violations was barred where plaintiff alleged that the violations stemmed from unconstitutional state court procedures, reasoning that addressing the claim would necessarily require reviewing the validity of the "erroneous" state court judgments). An additional indication that a section 1983 claim is in actuality a disguised attempt to seek review of a state court judgment is where it is apparent that the purpose of plaintiff's constitutional challenge is the invalidation of the state court judgment at issue. See Mcallan, 1998 WL 243269, *3 (finding that section 1983 claims alleging Fourteenth Amendment violation based on allegedly unconstitutional court procedures were in actuality "a disguised attempt to seek review of a state court adjudication" where it was "apparent that the purpose of plaintiff's challenge to the state court procedure [w]as to invalidate the state judgment in his case.") (citations omitted). Here, plaintiff's years of appeals and relitigation in the state courts have been directed at reversing the state court's judgments in favor of defendants. Plaintiff's purpose in filing in federal court, after having been permanently enjoined from doing so again in state court, is

clearly to obtain that reversal. Because plaintiff's allegation of civil rights violation "merely attest to plaintiff's dissatisfaction with the course of his litigation has taken in the state courts", the allegations are insufficient to confer Broadmoor Assoc., No. 94 Civ. 0613, 3-4 (S.D.N.Y. Feb.2, 1994)). Accordingly plaintiff's complaint must be dismissed in its entirety for lack of subject matter jurisdiction.[7]

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[7] Assuming arguendo that this Court were to find that it did have subject matter jurisdiction over plaintiff's claims as against NYS would be barred by the Eleventh Amendment and the claims against Chemical Bank and Chase would be precluded by the doctrine of res judicata. "The Eleventh Amendment bars from federal court all § 1983 suits brought by citizens against unconsenting states and agencies of such states." Mcallan, 1998 WL 24369, *4; see Quern v. Jordan, 440 U.S. 332 (1979); Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir. 1996); jurisdiction. Mcallan, 1998 WL 243269, *2 (quoting Chiania v. see also Santiago v. New York State Dep't. of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991) (finding that Eleventh Amendment also bars actions under § 1985). Here, plaintiff asserts a section 1983 claim against NYS. Because NYS has not consented to suit by the plaintiff in this case, NYS has not waived its constitutional protection under the Eleventh Amendment. Consequently, plaintiff's claim against NYS would be barred.

Plaintiff claims against Chemical and Chase would be precluded by the doctrine of res judicata. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in the action." Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Maharaj v. Bank America Corp., 128 F.3d 94, 97 (2d Cir. 1997); see 28 U.S.C. § 1738 (applying full faith and credit to state court judgments). Because New York is the state in which the original action was filed, the Court must apply New York's preclusion rule, which states: "If claims arise out of the same factual grouping, they are deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." Bal, 2000 WL 890199, *3. Here, there was a final judgment on the merits in state court on the claims against Chemical. Chemical was awarded summary judgment and plaintiff

In dismissing this action, the Court notes that "one of the collateral consequences of having two sets of courts is the problem posed by litigants who, in the words of judges who must deal with them, 'refuse to accept adverse decisions,' Homola v. McNamara, 59 F.3d 647, 651 (7th Cir. 1995), and 'repeatedly' subject the courts to 'vexatious and unmeritorious litigation,' Fariello v. Campbell, 860 F. Supp. 54, 58 (E.D.N.Y. 1994)." Suzana Sherry, Judicial Federalism in the Trenches; The Rooker-Feldman Doctrine in Action, 74 Notre Dame L. Rev. 1085, 1086 (1999). Plaintiff has litigated for seventeen years in state and federal courts concerning his twenty-five-year-old student loan debt. The slew of persistently adverse decisions that has resulted do not, as plaintiff contends, establish the venality of his opponents, the collusion of the Attorney General's office, or

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meticulously exhausted all of his appeals. Additionally, it is undisputed that Chase, which acquired Chemical and is Chemical's successor in interest, is Chemical's privy. Plaintiff is precluded from asserting any claims in this action against Chemical or its privy Chase that were or could have been raised in the state court action. Plaintiff's claims against Chemical and chase concern the constitutionality of 8 N.Y.C.R.R. § 2104.4, the applicability of form HE 700, and the validity of Chemical's and Chase's arguments pertaining thereto. All of these contentions were raised or could have been raised before the New York State Supreme Court in 1987. Plaintiff presents no legal support for a contrary conclusion. Finally, plaintiff's claims in this action arise out of the same factual grouping, specifically, the dispute surrounding the repayment of plaintiff's 1975 student loan. Consequently, assuming arguendo that the Court were to have subject matter jurisdiction over plaintiff's claims against Chase and Chemical, such claims would be precluded under the doctrine of res judicata.

the contumacious obtuseness of the judiciary, but rather evinces the meritlessness of plaintiff's claim and the frivolity of plaintiff's repeated applications for relief.

III. CHASE'S MOTION PURSUANT TO RULE 12(b)(6) AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Chase moves for dismissal of the complaint under Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment under Fed. R. Civ. P. 56, and plaintiff cross-moves for partial summary judgment under Fed. R. Civ. P. 56. The Court having dismissed the complaint in its entirety for lack of subject matter jurisdiction under the Rooker-Feldman doctrine, denies these motion as moot.

CONCLUSION

For the foregoing reasons, NYS's motion to dismiss the complaint is GRANTED. Chase's motion to dismiss under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment and plaintiff's cross-motion for partial summary judgment are DENIED as moot. The Clerk of the Court is directed to close the file in this action.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION INFORMATION FORM

BELL

V. Docket No. 00-9311

STATE OF NEW YORK

SEAL
[U.S. Court of Appeals]
Filed Feb 21 2002
[Second Circuit]

Movant:

John B. Bell
3400 Foxcroft Road #115
Miramar, FL 33025

	Yes	No
Consent sought from adversary (ies)?	____	____
Consent obtained from adversary (ies)?	____	____
Is oral argument desired?	____	____

ORDER

Before: Hon. Jon O. Newman, Hon. Amalya L. Kearse, Circuit Judges, Hon. Gregory W. Carman*, USCIT

IT IS HEREBY ORDERED that the renewed motion for modification of court's order be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By

Feb 21 2002
Date

/S/
Arthur M. Heller
Administrative Attorney

* Honorable Gregory W. Carman, of the United States Court of International Trade, sitting by designation.

At IAS Part 6 of the Supreme Court of the State of New York, County of New York, held at the New York County Courthouse, 60 Centre St., on the 25 day of August, 1997

PRESENT:

HONORABLE ELLIOTT WILK, Justice

John B. Bell,

Plaintiff, : Index No. 28103/83

-against- : Order

NEW YORK HIGHER EDUCATION Assistance CORPORATION, CHEMICAL BANK and NEW YORK LAW SCHOOL,

Defendants.

The Chase Manhattan Bank, formerly know as Chemical Bank ("Chemical"), having moved for an Order permanently enjoining plaintiff John B. Bell ("Bell") from any further relitigation of this matter; and Bell having cross-moved to vacate this Court's orders dated December 4 and 7, 1987 granting summary judgment in favor, respectively, of defendants New York State Higher Education Services Corporation ("NYSHESC") and Chemical, which orders were affirmed by the Supreme Court, Appellate Division,

First Department, respectively, on November 10, 1988 and December 13, 1988; and the Court of Appeals having dismissed and/or denied Bell's appeals therefrom, on November 18, 1988 and May 2, 1989, respectively; and the motion and the cross-motion having regularly come on to be heard on July 15, 1997;

NOW, upon reading and filing Chase's Notice of Motion, dated June 27, 1997, the affidavit of Manuel W. Gottlieb sworn to on June 27, 1997, and the exhibits annexed to it, andthe reply affidavit of Manuel W. Gottlieb sworn to on July 14, 1997, all submitted in support of Chemical's motion, and upon reading and filing Bell's Notice of Cross-Motion To Vacate the Decisions of December 4 and 7, 1987, For Summary Judgment Against the Defendants, To Amend The Ad Damnum Clause, dated July 10, 1997, the Affidavit of John B. Bell in support of the Cross-Motion and the Relief Sought, sworn to on July 10,1997, and the Reply Affidavit of John B. Bell in Opposition To The Motion and in support of the Cross-Motion, sworn to on July 17, 1987, with exhibit, all submitted in opposition to Chemical's motion and in support of Bell's cross-motion; and after due deliberation having been had, and the court having issued its decision dated July 17, 1997, it is hereby

and ADJUDGED (handwritten)

ORDERED, /that Bell is enjoined from commencing or reinstituting any further litigation, in this Court, any appellate court in which orders of this Court are reviewable, any other state of federal court, or any other tribunal, state or federal, on any legal theory of recovery or factual basis, relating in any way or manner to Bell's student loan or loans from Chemical and/or the guarantee thereof by NYSHESC which were the subject matter of the litigation described in the first paragraph hereof, against Chemical, any successor, assign, parent, subsidiary, affiliate or agent of Chemical, or NYSHESC, any successor, assign, parent, subsidiary, affiliate or agent of NYSHESC, all such claims being res judicata and permanently barred; provided, that nothing contained herein shall bar Bell from a direct appeal from this Order to each appellate court, the Supreme Court, Appellate Division, First Department and the Court of Appeals, in which orders of this Court are reviewable, and it is further

ORDERED, that Bell's cross-motion for an order

vacating the decisions of December 4 and 7, 1987, for summary judgment against the defendants, and to amend the ad damnum clause, is denied.

ENTER:
ELLIOT WILK

/S/

NEW YORK
COUNTY CLERK'S OFFICE

OCT 01 1997

FILED

Docket No. 02-607

Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

IN THE

United States Supreme Court

JOHN B. BELL,

Petitioner,

v.

THE STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT JPMORGAN CHASE BANK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J.P. MORGAN CHASE LEGAL DEPARTMENT
Attorneys for Respondent
JPMORGAN CHASE BANK, formerly known as Chemical Bank and The Chase Manhattan Bank
One Chase Manhattan Plaza, 26th Floor
New York, New York 10081
212-552-0949

Of Counsel:

Manuel W. Gottlieb

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THE INSTANT PETITION IS BARRED ON NUMEROUS GROUNDS

Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank and Chemical Bank, and successor in interest by merger to The Chase Manhattan Bank, N.A. ("Chase")[1], submits this Brief in Opposition to the petition for a writ of certiorari of Petitioner John B. Bell ("Petitioner" or "Bell").

Petitioner is an obsessed litigant[2] who has been blindly pursuing a meritless and long-resolved student loan-related claim against Chase and certain entities of the State of New York for almost two decades, the last thirteen years of which have constituted meritless attempted relitigation

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[1] Although named as a defendant in the caption, The Chase Manhattan Bank, N.A., which was merged into Chemical Bank in 1996, never had any dealings with Petitioner, whose twenty years of redundant and frivolous student loan-related litigation has been solely against the entity originally named Chemical Bank, which was subsequently renamed The Chase Manhattan Bank and later JPMorgan Chase Bank.

[2] In the precise words of Judge Allen G. Schwartz of the United States District Court for the Southern District of New York in his Opinion and Order below:

> Plaintiff has litigated for seventeen years in state and federal courts concerning his twenty-five-year old student loan debt. The slew of persistently adverse decisions that has resulted do not, as plaintiff contends, establish the venality of his opponents, the collusion of the Attorney General's office, or the contumacious obtuseness of the judiciary, but rather evinces the meritlessness of plaintiff's claim and the frivolity of plaintiff's repeated applications for relief.

See Opinion and Order dated September 2, 2000, 99 Civ. 5809 (AGS) (2000), pages A-3 to A-20 of Petitioner's Appendix, at A-19 to A-20.

of final 1989 rulings by the New York Court of Appeals denying and/or dismissing Bell's appeals from summary judgment decisions rendered against him as long ago as 1987.[3] Bell's present petition for a writ of certiorari is, consequently, not simply frivolous, but actively abusive, for at least the following reasons:

1. Petitioner's student loan-related claims against Chase were definitively resolved against him on summary judgment in *John B. Bell v. New York Higher Education Assistance Corporation*, 138 Misc. 2d 936, 526 N.Y.S. 2d 319 (Sup. Ct. N.Y. Co. 1987), *aff'd* 145 A.D. 2d 1006, 538 N.Y.S. 2d 451 (1st Dep't 1988), *appeal dismissed in part, denied in part*, 74 N.Y. 2d 623, 541 N.Y.S. 2d 979 (1989). Similarly, Bell's claims against Chase's co-defendant New York State Higher Education Services Corporation ("NYSHESC")[4] were resolved against him at the same time, 138 Misc 2d 939, 526 N.Y.S. 2d 316 (Sup. Ct. N.Y. Co. 1987) *aff'd*, 144 A.D. 2d 1047, 533 N.Y.S. 2d 642 (1st Dep't 1988), *appeal dismissed* 72 N.Y. 2d 871, 537 N.Y.S. 2d 493 (1989), *appeal denied*, 74 N.Y.2d 601, 541 N.Y.S. 2d 984 (1989). Bell's student loan-related claims, consequently, have been res judicata for thirteen years.

2. Refusing to accept these clear and definitive final judgments rendered against him by the New York courts, Bell instead attempted, for almost another entire decade, to relitigate these adverse judgments up and down the New York State court appellate ladder, for which he has repeat-

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[3] Bell has never repaid the loan in question, nor has any enforcement action ever been taken against him.

[4] Bell's original caption incorrectly named NYSHESC as "New York State Higher Education Assistance Corporation".

edly been sanctioned. By order dated October 1, 1997 (Petitioner's Appendix, A-23 to A-26), the Honorable Elliott Wilk, Justice, Supreme Court, New York County—the Justice who issued the 1987 summary judgment decisions against Bell—entered a permanent injunction order specifically barring Bell, on res judicata grounds, from further frivolous relitigation of his student loan claims. In 1998 that order was affirmed by the Appellate Division, First Department, which stated that "[t]he motion court correctly ruled that plaintiff's claims are barred by the doctrine of res judicata, and, in view of plaintiff's dilatory and frivolous tactics over the long history of this litigation, properly granted injunctive relief," and the New York Court of Appeals dismissed Bell's appeal therefrom. 250 A.D.2d 496, 671 N.Y.S. 2d 975 (1st Dep't), *appeal dismissed*, 92 N.Y.2d 877, 677 N.Y.S.2d 783 (1998). Subsequently, relying on Justice Wilk's 1997 order and its affirmations, the Appellate Division, Third Department affirmed the New York Court of Claims' 1999 dismissal (CM-60399, Ct. Clms, Oct. 15, 1999) of yet another Bell action on the same student loan, stating that "the Court of Claims appropriately found that the present claim is barred by the permanent injunction and the principles of res judicata." *John B. Bell v. The State of New York*, 277 A.D. 2d 854, 716 N.Y.S. 2d 818 (3d Dep't 2000), *appeal dism'd*, 96 N.Y.2d 746, 722 N.Y.S. 2d 128 (2001). Justice Wilk's order and its affirmances, and the New York courts' determinations that Bell's claims are res judicata, are entitled to preclusive effect at bar on principles of Full Faith and Credit and comity.

3. As Judge Schwartz ruled below, plaintiff's present claim is barred by the *Rooker-Feldman* doctrine (*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462,

476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)), which bars a Federal District Court from acting as an appellate court over state court decisions because the State court decisions purportedly were wrong.[5]

4. Nor is this Bell's first attempt to seek relief from the Federal courts, the Second Circuit, and even this Court, by miscasting his State court defeats as violations of 42 U.S.C § 1983. In 1985 Judge Broderick of the United States District Court for the Southern District of New York, in *John B. Bell v. The State of New York and New York Law School*, 85 Civ. 5639 (VLB)[6] dismissed Bell's prior § 1983 claim,[7] on the grounds that all Bell was attempting to do was to "constitute this court, a Court of Appeals over what the state court has done" by wrongly attacking those state court decisions on purported "constitutional" grounds. Judge Broderick also granted sanctions against Bell by order dated December 20, 1985. The Second Circuit affirmed, by order dated March 23, 1985 (Respondent's Appendix, R.A.-1 to R.A.-3), stating: "Judge Broderick . . . properly ruled that Bell's allegations were completely frivolous and were wholly unavailing to state a cognizable

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[5] The Second Circuit subsequently dismissed Petitioner's appeal, on motion, as frivolous pursuant to 28 U.S.C. § 1915(d)(2)(B)(i). *See* Petitioner's Appendix, A-1 to A-2.

[6] Insofar as Judge Schwartz quoted extensively (*see* Petitioner's Appendix A-15 to A-16, n.6) from Judge Broderick's 1985 decision, Chase will not burden the Court with inclusion of that decision here. The decision, of course, is in the Record.

[7] Bell claimed in 1985 that the State court's dismissal of his claim against then co-defendant New York Law School on limitations grounds gave rise to a § 1983 violation, just as he claims here that a dismissal now on res judicata grounds gives rise to the same type of spurious § 1983 claim.

claim pursuant to 42 U.S.C. § 1985" (*id.*, R.A.-2). This Court denied Bell's prior petition for a writ of certiorari, 479 U.S. 854, 107 S. Ct. 190, 95 L. Ed. 2d 123 (1986), and also denied Bell's motion for a rehearing, 479 U.S. 1001, 107 S. Ct. 613, 95. Ed. 2d (1986). On the separate ground of collateral estoppel, therefore, Bell cannot maintain this latest iteration of his twenty-year old, fully resolved claim.

5. Finally, as discussed below, Bell secured his extension of time in which to file the instant petition for a writ of certiorari by misrepresenting to this Court the timing and circumstances of the Second Circuit's rulings. The instant petition is, therefore, jurisdictionally defective because time-barred as well.

ARGUMENT

I. THE DECISIONS BELOW CORRECTLY DISMISSED BELL'S CLAIM INITIALLY UNDER THE ROOKER-FELDMAN DOCTRINE AND SUBSEQUENTLY ON APPEAL AS FRIVOLOUS

Judge Schwartz dismissed Bell's complaint (Opinion and Order dated September 6, 2001, Petitioner's Appendix A-3 to A-20), for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* Doctrine—that is, on the same basis on which Judge Broderick had dismissed Bell's prior § 1983 claim in 1985—*i.e.*, because, as this Court stated in *Feldman*, 460 U.S. at 483, n.15, where "the District Court is in essence being called upon to review the state court decision" in a situation in which "claims

presented to a United States District Court are *inextricably intertwined* with the state court's [determination]," the District Court lacks jurisdiction to conduct such a review. Judge Schwartz found that "[h]ere, plaintiff's claims are 'inextricably intertwined' with the state court judgment because the essence of plaintiff's claims is that the state court judgment was 'procured fraudulently'" (Petitioner's Appendix, A-13). As Judge Schwartz summed up:

> Plaintiff, in alleging that defendants misleadingly remained silent or fraudulently advanced certain arguments with the intent of unlawfully interfering with state court adjudication, implicitly asks this court, in contravention of the Rooker-Feldman doctrine, to reverse the state court's judgment . . . . Consequently, plaintiff's claims alleging that the state court judgments were wrongfully procured are barred by the Rooker-Feldman doctrine . . . . (citations omitted) (Petitioner's Appendix, A-14 to A-15).

Judge Schwartz went on (*id.*, A-15) to cite the substantial case law authority that a plaintiff may not evade *Rooker-Feldman* merely by claiming a § 1983 violation (*see, e.g., Allen v. McCurry*, 449 U.S. 90, 94-96, 101 S. Ct. 411, 414-15, 66 L. Ed. 2d 308 (1980)). Nothing articulated by Bell either below or on the instant certiorari petition even suggests the possibility of any contrary result here. All Bell is attempting to do at bar is to assert that, both prior to the final decisions against him in 1987-1989, and subsequent to them, in the dreary decade of abusive attempted relitigation to which he subjected the defendants, the latter somehow misled the State court. Even putting aside the unsupported and totally meritless nature of

these allegations,[8] the District Court correctly ruled that *Rooker-Feldman* bars any further relitigation in the Federal courts based on such allegations.[9]

The Second Circuit, by Order dated October 16, 2001 (Petitioner's Appendix, A-1 to A-2), granted respondents' motions to dismiss the appeal as frivolous pursuant to 28

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[8] The essential crux of petitioner's entire argument (Petition at 7-8) on this issue is that the New York State Supreme Court's rulings were *incorrect* because defendants "hid" from that court the fact that the New York Court of Claims had previously ruled otherwise in 1986 —*i.e.*, that NYSHESC was not a State agency. But the Supreme Court, New York County and the Court of Claims are trial courts of first instance, at the same judicial level, from which appeals go respectively to the First and Third Appellate Divisions. (The latter two appellants courts, it should be noted, have both agreed that Bell's claims are res judicata.) The fact that Justice Wilk and the Court of Claims may have reached different conclusions neither indicates that Justice Wilk was not aware of contrary authorities—in fact, he even explicitly *acknowledged* the existence of such contrary authority in his decision, 138 Misc.2d at 934, 526 N.Y.S.2d at 318—*nor* does it mean that he was wrong. But, of course, as discussed below, under all applicable law it would not matter even *had* he been wrong, either under *Rooker-Feldman* or applicable principles of res judicata. Similarly, Petitioner's invocation of legal positions taken by NYSHESC years *later* in opinion letters written for non-litigation purposes certainly does not invalidate Justice Wilk's 1987 decisions, nor suggest any basis for attacking his grant of summary judgment either to NYSHESC or, especially, to Chase, which admittedly only followed NYSHESC's regulations.

[9] As has often been the case with Petitioner, it is frequently not easy to determine exactly what he is appealing *from*. Technically, Bell's appeal dates not from Judge Schwartz's September 6, 2000 dismissal Opinion and Order, but from the Judge's Memorandum Order of April 29, 2001 denying petitioner's Federal Rule 60(b) motion. A copy of that order, which Petitioner does not append, is attached hereto as Respondent's Appendix R.A.-4 to R.A.-7.

U.S.C. § 1915(d)(2)(B)(i). In the light of the sorry history of this litigation, briefly summarized above and more fully by Judge Schwartz (*see* Petitioner's Appendix, A-4 to A-9), it cannot conceivably be argued that this was an incorrect result under applicable law.

II. RES JUDICATA, FULL FAITH AND CREDIT AND PRINCIPLES OF COMITY ALSO REQUIRE DENIAL OF BELL'S PETITION

A. Both The Decisions On The Merits Of 1987-1989 And The Orders Of 1997 And 1998 Barring Further Relitigation Of Bell's Claim On Res Judicata Grounds Are Entitled To Full Faith And Credit In This Court

Not only the Full Faith and Credit Clause of the Constitution, Article IV, § 1, and 28 U.S.C. § 1738 (1995 & Supp. 2000) ("State and Territorial Statutes and judicial proceedings; full faith and credit"), but the "general federal law of res judicata"—*see, e.g., Winters v. Lavine*, 574 F.2d 46, 54-56 (2d Cir. 1978)—and principles of comity require that (a) Justice Wilk's 1987 summary judgment decisions, and the 1988-1989 affirmances thereof, dismissing Bell's claims based on his student loan agreement against Chase and NYSHESC on the merits, and (b) Justice Wilk's 1997 Order barring Bell from further relitigation on res judicata grounds, the Appellate Division's 1998 affirmance thereof, and the New York Court of Appeals' dismissal of the appeal therefrom, be given Full Faith and Credit.

Under 28 U.S.C. § 1738, a Federal court is required to give the same preclusive effect to a state court judgment as

another court of that state would give. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523, 106 S. Ct. 768, 771, 88 L. Ed. 887 (1986); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 56 (1984) (same); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466-67, 102 S. Ct. 1883, 1889-90, 72 L. Ed. 2d 262 (1982) (federal court action would be precluded by prior state court judgment because action would be precluded in state in which judgment rendered); *Allen v. McCurry*, 449 U.S. at 94-96, 101 S. Ct. at 414-15, 66 L. Ed. 2d 308 (notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources underlie preclusive effect given to prior state court judgments).

Specifically, the State courts' own determination that res judicata bars Bell's claims should *itself* be held dispositive: "the Full Faith and Credit Act requires that federal courts give the state-court judgment, *and particularly the state court's resolution of the res judicata issue*, the same preclusive effect it would have had in another court of the same State." *Parsons Steel*, 474 U.S. at 525, 166 S. Ct. at 772, 88 L. Ed. 2d 887 (emphasis added). Consequently the validity of Justice Wilk's order barring further vexatious relitigation by Bell on res judicata grounds, and its affirmances, should be recognized by this Court as well.

Although Judge Schwartz did not base his dismissal of Bell's complaint on res judicata grounds because he concluded that under *Rooker-Feldman* he lacked jurisdiction even to reach that ground, nevertheless he made it clear that he had determined that, were he to reach the issue, res judicata principles also would bar any such suit:

Plaintiff's claims against Chemical and Chase would be precluded by the doctrine of res judicata. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in the action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997); *see* 28 U.S.C. § 1738 (applying full faith and credit to state court judgments). Because New York is the state in which the original action was filed, the Court must apply New York's preclusion rule, which states: "If claims arise out of the same factual grouping, they are deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." *Bal [v. New York City Loft Bd.]*, 2000 WL890199, *3. Here, there was a final judgment on the merits in state court on the claims against Chemical. Chemical was awarded summary judgment and plaintiff meticulously exhausted all of his appeals. Additionally, it is undisputed that Chase, which acquired Chemical and is Chemical's successor in interest, is Chemical's privy.[10] Plaintiff is precluded from asserting any claims in this action against Chemical or its privy

[10] In actual fact, Chemical acquired Chase and, as the survivor corporation, was renamed The Chase Manhattan Bank. Subsequently, Chase, the renamed Chemical, acquired Morgan Guaranty Trust Company and was renamed again, this time JPMorgan Chase Bank. Therefore it is even simpler than Judge Schwartz stated: Petitioner has been litigating with the same corporate entity, originally named Chemical Bank, for twenty years.

Chase that were or could have been raised in the state court action. Plaintiff's claims against Chemical and Chase concern the constitutionality of 8 N.Y.C.R.R. § 2104.4, the applicability of form HE 700, and the validity of Chemical's and Chase's arguments pertaining thereto. All of these contentions were raised or could have been raised before the New York State Supreme Court in 1987. Plaintiff presents no legal support for a contrary conclusion. Finally, plaintiff's claims in this action arise out of the same factual grouping, specifically, the dispute surrounding the repayment of plaintiff's 1975 student loan. Consequently, assuming arguendo that the Court were to have subject matter jurisdiction over plaintiff's claims against Chase and Chemical, such claims would be precluded under the doctrine of res judicata. (Petitioner's Appendix, A-18 to A-19, n.7).

B. The State Courts Correctly Applied New York Res Judicata Principles In This Matter

In *Migra*, 465 U.S. at 81, 104 S. Ct. at 896, 79 L. Ed. 2d. 56, this Court held that the res judicata effect of state court decisions in § 1983 actions is a matter of state law. *Heck v. Humphrey*, 512 U.S. 477, 480 n.2, 114 S. Ct. 2364, 2369 n.2, 129 L. Ed. 2d 383 (1994) (same); *see Kulak v. The City of New York*, 88 F.3d 63 71 (2d Cir. 1996) (whether plaintiff's subsequently-asserted § 1983 claims can be maintained must be analyzed in light of New York issue preclusion law); and, as noted above, in *Parsons Steel*, 474 U.S. at 525, 106 S. Ct. at 772, 88 L. Ed. 2d 887, this Court further held that a state court's determination as to the res

judicata effect of its decisions is *itself* entitled to Full Faith and Credit.

It should be noted further that applicable law does *not* require the prior State court decision to have been *correct* for it to have preclusive effect. *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986). This is true of civil rights claims as well, *Allen v. McCurry*, 449 U.S. at 101, 101 S. Ct. at 418, 66 L. Ed. 2d 308 (the fact that § 1983 was intended to protect persons who had not had a full and fair opportunity to litigate an issue "lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous"). Nevertheless, in this case, as discussed below, the State courts' determinations clearly *were* correct.

Bell's 1983 claim that Chemical wrongfully entered a default on his student loan in explicit conformity with the rules set forth in the NYSHESC handbook cannot be relitigated merely because he has added the allegations that NYSHESC's requirements were unconstitutionally promulgated by the latter[11] or that (a) Chase's reliance on these Rules, and (b) its assertion of valid affirmative defenses in the State court action, somehow create a federal § 1983 claim. The only possible result under the New York law of

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[11] Bell's belated "constitutional" challenge to withdrawn 8 NYCRR 2104.4 is, of course, precisely the type of State law question which the Second Circuit would certify to the New York Court of Appeals for resolution (Second Circuit Rules § 0.27), and the New York Court of Appeals would determine whether to consider under Court of Appeals Rule § 500.17. Here, of course, the New York Court of Appeals has refused to review this question on numerous redundant "appeals" by Bell.

res judicata, which is itself consistent with the position articulated in the Restatement (Second) of Judgments § 24 (2d Ed. 1982), is that Bell's claims, however he attempts to camouflage them, are barred:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[12]

In *Reilly v. Reid*, 45 N.Y.2d 24, 407 N.Y.S.2d 645 (1978), the New York Court of Appeals analyzed the issue of what constituted "the same cause of action" for res judicata purposes. In its analysis, the Court stated:

> A cause of action may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought. In the sense of res judicata or claim preclusion, although there may be

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[12] This Restatement test has been adopted by various federal courts, including the Second Circuit. *See Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977, 122 L. Ed. 2d 131 (1993); 18 *Moore's Federal Practice* § 131. 20[2] (1999).

> separately stated or statable causes of action, they are nevertheless based on the 'same cause of action' . . . . *Nor will differences in legal theory generally avail to permit relitigation of claims based on the same gravamen.* . . . (emphasis supplied).

45 N.Y.2d at 29, 407 N.Y.S.2d at 648. The Court of Appeals concluded that "where the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action." 45 N.Y.2d at 30, 407 N.Y.S.2d at 649.

In *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981), the Court of Appeals held that a trespass claim arose out of the same transaction as did a *de facto* appropriation claim, and consequently was barred:

> [O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. . . . When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' . . . the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions. . . .

54 N.Y.2d at 357-58, 445 N.Y.S.2d at 688-89 (citations omitted). *See Smith v. Russell Sage College*, 54 N.Y.2d 185, 192, 445 N.Y.S.2d 68, 71 (1981) (". . . in deciding res judicata issues, we have moved to a more pragmatic test, which sees a claim or cause of action as 'coterminous

with the transaction regardless of the number of substantive theories or variant forms of relief . . . available to the plaintiff' ").

It could not be clearer from the above authority that under applicable New York precedents Bell's student loan-related claims have been finally dismissed, and no newly minted legal theory can serve to resuscitate them. Petitioner's entire argument regarding res judicata (Petition at 5-16) is based on his refusal to recognize this fundamental principle of law—*i.e.*, that the decisions of 1987-1989 were final as to his asserted claims, and that his subsequent change of legal theories cannot alter the fact that those claims are res judicata. Bell argues instead that, years after the decisions against him became final, when he sought to revive those claims on the basis of spurious "new evidence," and the New York courts refused to allow him to do so, certain "unresolved issues" thereby came into existence and, somehow, became a part of the original litigation, which (somehow) renders the prior final decisions non-final.

Consequently, as Bell would have it, his entire decade-plus of subsequent relitigation efforts is simply part of the *same* litigation he originally filed in 1983, and thus res judicata cannot apply, because it is all *one proceeding* (Petition at 12-13). In reliance on this dizzying bootstrap argument, a deliberate misreading of all applicable law, Bell cites (*id.* at 12) New York Civil Practice Law and Rules ("CPLR") § 5015, which simply states that "[t]he court which rendered a judgment or order *may* relieve a party from it upon such terms as may be just. . . ." (emphasis supplied). Bell, however, interprets CPLR § 5015 as

requiring such a result, which even the language of the statute itself belies.

In sum, case law defining res judicata in the New York State courts specifically bars Bell's attempt to relitigate yet again an already determined claim for relief merely by employing an ostensibly new legal theory to dress up the same tired factual claim. Both the original dismissals of Bell's claims and their affirmances by the State courts, and the orders of Justice Wilk and the Appellate Division, permanently barring Bell from further relitigation of his student loan claim on res judicata grounds, not only require Full Faith and Credit and acceptance on grounds of comity by this Court, but are themselves entirely consistent with New York law.

C. The State Court Orders Barring Further Relitigation Of Bell's Claim On Res Judicata Grounds Are Consistent With Federal Decisional Law As Well

Even though, as noted above, in *Migra*, 465 U.S. at 81, 104 S. Ct. at 896, 79 L. Ed. 2d 56, this Court has held that the res judicata effect of State court decisions is a matter of State law, it should nevertheless be noted that Federal decisional law would require precisely the *same* result as that reached by the State courts which have dealt with Bell's endless attempts to relitigate his finally resolved claim, and those decisions would extend to this latest attempt to recast his claim as a bogus § 1983 claim as well. *Allen v. McCurry*, 449 U.S. at 101, S. Ct. at 418, 66 L. Ed. 2d 308.

"New legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata." *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985). "To indulge" a plaintiff's "lavish desire" to relitigate on "nothing more than a new legal formulation of the very dispute resolved by [the] . . . original decision" would be "an acquiescence in the abuse of the judicial process." *Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied*, 430 U.S. 955, 97 S. Ct. 1601, 51 L. Ed. 2d 805 (1977). "Whatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata", *Woods v. Dunlop Tire Corp.*, 972 F.2d at 39, *quoting Berlitz Sch. Of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.), *cert denied*, 434 U.S. 903, 98 S. Ct. 300, 54 L. Ed. 2d 190 (1977) ("For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies"). Or, as the Ninth Circuit put it in *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 634 (9th Cir. 1990), where it was asserted that in the first action between the parties plaintiff's counsel "did not happen to think of the theory he now advances" in the subsequent action, "[o]versight erects no bar [to] res judicata with respect to those claims that could have been pursued in the earlier litigation." Similarly, as stated in *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993), "[a] plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory."

III. BELL'S PETITION IS ALSO SUBJECT TO DENIAL ON COLLATERAL ESTOPPEL GROUNDS AS WELL

As noted above, in 1985 Bell commenced an action, entitled *John B. Bell v. The State of New York and New York Law School*, in the United States District Court for the Southern District of New York (85 Civ. 5639 (VLB)), also purportedly pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that in his then still-pending State court student loan action his claims against then co-defendant New York Law School had wrongly been dismissed on statute of limitations grounds, because the mere *assertion* of the limitations defense in State court constituted a § 1985 violation. As Judge Schwartz noted (Petitioner's Appendix, A-15 to A-16, n.6), in 1985 Judge Broderick rejected Bell's attempt to cobble together a bogus § 1983 claim merely to circumvent that adverse State court ruling. Judge Broderick's 1985 oral and written dismissal decision and orders were affirmed in 1986 by the Second Circuit (Respondent's Appendix, R.A.-1 to R.A.-3).

Bell now attempts, more than seventeen years later, to appeal the dismissal of his most recently asserted § 1983 civil rights claim, a claim based once again simply on the defendants' having successfully defended the same twenty-year old claim, this time on res judicata grounds, in the state courts. In *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S Ct. 1434, 1442, 28 L. Ed. 2d 788 (1971), this Court, deciding the "broader question" of "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," stated that permitting repeated litigation of the same issue against different

defendants "reflects either the aura of the gaming table or a 'lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure' ", *quoting Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185, 72 S. Ct. 219, 222, 96 L. Ed. 200 (1952).

The instant matter presents a similar question of the appropriateness of "defensive" collateral estoppel to preclude Bell from relitigating precisely the same type of bogus § 1983 claim as was resolved in the earlier action, relating to the same transaction. *See Kulak*, 88 F.3d at 72 (summary judgment affirmed where plaintiff could not demonstrate that issue preclusion doctrine should not bar him from relitigating his claims). As Judge Schwartz stated below (Petitioner's Appendix, A-16, n. 6): "For the same reasons, this action must likewise be dismissed."

IV. BELL'S PETITION IS UNTIMELY BECAUSE HE MISREPRESENTED TO THIS COURT THE SEQUENCE AND TIMING OF THE SECOND CIRCUIT'S RULINGS

Petitioner secured an extension of time in which to file his present petition by misrepresenting to this Court the procedural history in the Second Circuit. All Bell states in his Petition (at 2) on this subject is "The Court of Appeals decided my case on October 16, 2001 and the time to file a writ of certiorari was extended by the Honorable Justice Ginsburg, to and including July 22, 2002, on May 8, 2002 in Application No. 01A 856." While, strictly speaking, this capsule summary is itself true, Petitioner's *application* for an extension of time in which to file his Petition was based entirely on misrepresentation, as follows.

On Bell's appeal to the Second Circuit from Justice Schwartz's April 29, 2001 denial of Bell's Rule 60(b) motion for rescission and vacation of the District Court's September 26, 2000 dismissal order (Respondent's Appendix, R.A.-4 to R.A.-7), the Second Circuit, by Order dated October 16, 2001, dismissed Bell's appeal as frivolous pursuant to 28 U.S.C. § 1915(d)(2)(B)(i) (Petitioner's Appendix, A-1 to A-2).

Upon that Second Circuit dismissal, Bell filed a Motion for Modification of [that] Court's Order of 10/16/01 to Reinstate the Appeal, Pursuant to FRAP 27(a)(3)(b), dated November 1, 2001 (Respondent's Appendix, R.A.-8 to R.A.-11). The Second Circuit denied that motion by order dated *January 4, 2002* (*id.*, R.A.-10). Significantly, Petitioner does not now, and did not earlier, on his motion to this Court for an extension of time, provide a copy of this first order denying reargument and/or vacation of the October 16, 2001 dismissal order. Bell's time to file a petition for writ of certiorari with this Court accordingly expired ninety days after the date of that initial decision, January 4, 2002—that is, on *April 5, 2002*.

Supreme Court Rule 13.3 states in pertinent part that:

> 3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). *But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties* (whether or not they requested rehearing or joined in the petition of rehearing) *runs from the date of the denial of the peti-*

> *tion for rehearing* or, if the petition for rehearing is granted, the subsequent entry of judgment.

(Emphasis supplied).

Bell, however, as usual refusing to accept the Second Circuit's January 4, 2002 denial of his modification motion, filed, on January 20, 2002, another redundant and extraneous motion, styled as a "*Renewal* Motion for Modification of [that] Court Order of 10/16/01 to Reinstate the Appeal Pursuant to FRAP 27(a)(3)(b)" (Respondent's Appendix, R.A.-12 to R.A.-14; emphasis supplied). In that "renewal" motion, Bell conceded (*see* Respondent's Appendix, R.A.-13) that "[a] previous application for the relief requested herein has been made to this Court"—that is, the motion denied by the Second Circuit by its Order dated January 4, 2002.

The Second Circuit also denied Bell's renewal motion for modification of the October 16, 2001 Order, this time on February 21, 2002. *See* Petitioner's Appendix, A-21 to A-22. As of that date, therefore, Bell *still* had remaining the period from February 21, 2002 to April 5, 2002 (the latter date being ninety days from the January 4, 2002 order denying his initial reargument motion) in which to file his certiorari petition, and almost as long (*see* below) to file a timely motion for an extension of time to file his petition. He did neither.

Instead, Bell filed an extension motion (R.A.-15) dated April 30, 2002—twenty-five days too late—in which filing he misrepresented to this Court the timing of the Second Circuit's rulings. Thus Petitioner stated in his affidavit in support of that motion (Respondent's Appendix, R.A.-16 to R.A.-23) that: "[p]etitioner respectfully requests that

since the fundamental issues involved in the State court action are now under consideration by OCA [the New York Office of Court Administration] *that petitioner's time in which to file a writ of certiorari be extended, from May 21, 2002 to August 21, 2002 . . . .*" (*id.*, R.A.-23; emphasis supplied.) But this completely misstates the applicable time period, which allowed (Supreme Court Rule 13.1) filing of a petition for a writ of certiorari in this case only through April 5, 2002 (90 days from the January 4, 2002 Second Circuit Order, *not* May 21, 2002). The Rule further permits such a request for an extension of time only "[f]or good cause,"[13] and then only when made prior to ten days before the expiration of that period (Rule 13.5) unless there are "extraordinary circumstances." Bell's untimely motion was thus approximately a month late under Rule 13.5. That Rule not only explicitly states that "[a]n application to extend the time to file a petition for a writ of certiorari is not favored," but mandates that "[t]he application *must* be received by the clerk *at least 10 days before the date the petition is due*, except in extraordinary circumstances" (emphasis supplied).

Bell's motion, however, was dated (R.A.-23) twenty-five days *after* his petition was due, and "extraordinary circumstances" "clearly consists of more than the 'good cause' that must be shown for an extension requested *prior* to the final 10 days of the period," 12 *Moore's Federal Practice* § 530.03[1] (Matthew Bender 3d Ed. 2002)

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[13] Bell's sole representation on the subject of "good cause" is that the Office of the Governor of New York had referred a new Bell letter demanding "redress" to the New York Office of Court Administration—that is, to the administrative office of the very court system Bell has abused for so long, and which has repeatedly sanctioned him for doing so.

(emphasis supplied). Clearly no such "extraordinary circumstances" existed here.

In the light of Bell's twenty years of frivolous litigation and abusive relitigation of this entirely res judicata matter, this misrepresentation is hardly his greatest sin. Nevertheless, his petition for a writ of certiorari is jurisdictionally defective because untimely; this Court's grant of an extension of time in which to file his petition was secured solely by means of Petitioner's misrepresentation; and counsel for Chase points this out as required by Supreme Court Rule 15.1: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

CONCLUSION

For all of the above reasons, it is submitted that this Court should deny Bell's petition for a writ of certiorari, which is utterly without any vestige of merit.

Dated: New York, New York
November 21, 2002

Respectfully submitted,

J.P. MORGAN CHASE LEGAL DEPARTMENT

By: /s/ Manuel W. Gottlieb

Manuel W. Gottlieb (MG - 7129)
Attorneys for Defendant
J.P. Morgan Chase Bank, formerly known as The Chase Manhattan Bank and Chemical Bank
One Chase Manhattan Plaza, 26th Floor
New York, New York 10081
(212) 552-0949

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

85-7893

Filed Mar. 28, 1986

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of March one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J.MESKILL,

Circuit Judges.

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN, & FRANKEL, ESQS., ANDREA LIKWORNIK and MICHAEL B. REUBEN,

Defendants-Appellees.

MANDATE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Bell contends the district court erred by dismissing his complaint for failure to state a claim. The appellant, however, provided no support for his assertion that the appellees had engaged in a conspiracy, and admitted that he had failed to allege a class-based discriminatory animus. Judge Broderick, therefore, properly ruled that Bell's allegations were completely frivolous and were wholly unavailing to state a cognizable claim pursuant to 42 U.S.C. § 1985. Accordingly, the complaint was correctly dismissed. Fed. R. Civ. P. 12(b)(6).

2. Bell also contends the district judge erred by imposing costs and attorneys' fees against him. Judge Broderick, however, on two occasions warned the appellant of the risk of sanctions and urged Bell to withdraw his complaint. In light of Bell's obdurate pursuit of his patently meritless claims, the fees and costs were fully warranted. *Gerena-Valentin* v. *Koch*, 739 F.2d 755, 761 (2d Cir. 1984); *see also Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

3. Accordingly, the judgment of the district court is affirmed.

4. Bell pursues the same frivolous points on appeal that he addressed to the district court. Accordingly, we award to the appellees double costs and attorneys' fees, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912. *See Mone* v. *Commissioner*, 774 F.2d 570, 574 (2d. Cir. 1985).

[STAMP]

Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in [ILLEGIBLE] cases before this or any other court.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,

/s/ WILLIAM H. TIMBERS
William H. Timbers,

/s/ THOMAS J. MESKILL
Thomas J. Meskill,
Circuit Judges.

[STAMP]

A TRUE COPY
ELAINE B. GOLDSMITH

/s/ ELAINE B. GOLDSMITH
Clerk

[STAMP]
THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 6-24-86.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 5809 (AGS)
Filed Apr. 25, 2001

JOHN B. BELL,

Plaintiff,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.,

Defendants.

MEMORANDUM ORDER

ALLEN G. SCHWARTZ, UNITED STATES DISTRICT JUDGE:

In an Opinion and Order dated September 6, 2000 (the "Order"), the Court dismissed the complaint in its entirety for lack of subject matter jurisdiction, pursuant to the Rooker-Feldman doctrine. On September 13, 2000, the Clerk of the Court entered judgment dismissing the action pursuant to the Order. Plaintiff now moves pursuant to Fed. R. Civ. P. 60(b) for, among other things, rescission and vacation of the Order. For the reasons set forth below, plaintiff's motion is denied.

Plaintiff does not specify under which subdivision of Rule 60(b) he seeks relief from judgment. The Court con-

strues the instant motion as being made pursuant to Rule 60(b)(6) because plaintiff's arguments do not appear to fall within the scope of subdivisions (1) through (5) of Rule 60(b). In addition, the State of New York characterized this as a Rule 60(b)(6) motion in its memorandum. (Mem. of Law on Behalf of State of New York in Opp. to Pl.'s Application to Vacate the J. at 4-6.) In his reply papers, plaintiff did not dispute that characterization, arguing instead that he met the criteria for application of Rule 60(b)(6). (Reply Aff. to State of New York's Opp. to the Rule 60B Mot. ¶¶ 2-3.)

Relief may be granted under Rule 60(b)(6) only in extraordinary circumstances. *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 461 (2d Cir. 1994) (citing *Ackerman v. United States*, 340 U.S. 193, 1999 (1950)). Plaintiff claims that there are extraordinary circumstances because the defendants have allegedly violated his constitutional rights for over thirteen years. (Reply Aff. to State of New York's Opp. to the Rule 60B Mot. ¶3.) This is hardly extraordinary. Plaintiffs bringing actions for alleged civil rights violations commonly assert that their rights were violated. That does not entitle every non-prevailing civil rights plaintiff to relief under Rule 60(b)(6). Nor does plaintiff's contention that the Order is legally incorrect (Pl.'s Mem. of Law in Supp. of the Rule 60(B) Mot. at 10-16) establish extraordinary circumstances. *Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986) ("The contention that the court's decision misapplied *Sandstrom* was inadequate, for a Rule 60(b)(6) motion may not be used as a substitute for appeal.") The Court finds nothing in the record warranting a finding that extraordinary circumstances are present here such that relief is appropriate

under Rule 60(b)(6). Accordingly, plaintiff's motion pursuant to Rule 60(b)(6) is denied.

The Second Circuit has held that, in certain circumstances, a Rule 60(b) motion should be treated as a motion under Fed. R. Civ. P. 59(e). *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.23d 130, 136-37 (2d Cir. 2000). Even if the Court were to construe the instant motion as being made under Rule 59(e), the motion would fail. Rule 59(e) requires that a motion thereunder be made within 10 days, as calculated pursuant to Fed. R. Civ. P. 6(a). Judgment was entered in this action on September 13, 2000. The instant motion was apparently served on October 2, 2000.[1] (*See* Notice of Motion.) This is outside the ten-day period permitted by Rules 6(a) and 59(e). Accordingly, the motion would have to be denied as untimely if construed as a Rule 59(e) motion.

Moreover, even if the motion were timely served, plaintiff has not met the standards for alteration or amendment of a judgment. In order to prevail on a Rule 59(e) motion, the movant must show controlling decisions or factual matters that the court overlooked that might have materially influenced the prior decision. *E.g.*, *Griffiri Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999). In the alternative, the movant must show a need to correct clear error or prevent manifest injustice. *Id.* Plaintiff has not carried his burden as movant. He has pointed to no controlling decisions that the Court overlooked, let alone that might have materially influenced the Court. He has

---

[1] Plaintiff, erroneously operating under a superseded set of this Court's Individual Rules of Practice, filed his papers when the motion was fully briefed. Accordingly, the Court accepts the service date of the moving papers as the operative date under Rule 59(e).

presented no facts that might have materially influenced the prior decision. And there is neither clear error in the Order nor any injustice in dismissing plaintiff's complaint. Accordingly, even if the Court were to construe the instant motion as made under 59(e), and even if the Court were to assume that the instant motion was timely under Rules 6(a) and 59(e), the Court would deny the motion.

Given the Court's denial of plaintiff's request to rescind or vacate the Order, or the judgment resulting therefrom, plaintiff's other requests for relief are denied as moot.

For the reasons set forth above, plaintiff's motion pursuant to Fed. R. Civ. P. 60(b) is denied.

SO ORDERED.

/s/ ALLEN G. SCHWARTZ
Allen G. Schwartz, U.S.D.J.

Dated: New York, New York
April 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9311
Filed Nov. 7, 2001

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK
and CHASE MANHATTAN BANK, N.A.,

Defendants-Respondents.

Motion for Modification of this Court's Order of 10/16/01
to Reinstate the Appeal,
Pursuant to FRAP 27(a)(3)(b)

MOTION BY:

JOHN B. BELL
Appellant, Pro Se
3400 Foxcroft Road #115
Miramar, FL 33025
1(954) 447-0217 (Home)
1(954) 961-7209

OPPOSING COUNSEL:

J.P. MORGAN CHASE
LEGAL DEPT.
Attorneys for Chemical
& Chase
One Chase Manhattan Pl.
26th Flr.
New York, New York 10081
1(212) 552-0949

MOTION BY:	OPPOSING COUNSEL:
	ATTORNEY GENERAL STATE OF NEW YORK 120 Broadway – 24th Flr. New York, New York 10271 1(212) 416-8594/8610
The consent of opposing counsel has neither been sought nor obtained.	The relief herein has not been sought below.
Service of the within motion has been effected by mail.	No previous application for the relief requested herein has ever been made in the 2d Circuit.
The requested return date is November 19, 2001	An expedited appeal would be dispositive in this motion.
The Appeal was scheduled by an Order, for September 17, 2001	This Court's Order of October 16, 2001 maintains the status quo.

Brief statement of the relief requested: Modification the Court's Order of October 16, 2001, to reinstatement of the scheduled appeal herein.

/s/ JOHN B. BELL
By:
JOHN B. BELL

/s/ JOHN B. BELL
Appearing for: John B. Bell,
Pro Se

Date: November 1, 2001

ORDER

Filed Jan. 4, 2002

Before:

Hon. Jon O. Newman,
Hon. Amalya L. Kearse, *Circuit Judges*,
Hon. Gregory W. Carman*, USCIT

IT IS HEREBY ORDERED that the motion for modification of the order of 10/16/01 be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
by
/s/ ARTHUR HELLER
Arthur M. Heller, Administrative Attorney

Jan. 4, 2002
Date

* Honorable Gregory W. Carman of the United States Court of International Trade, sitting by designation.

Manuel W. Gottlieb, Esq.
Chase Manhattan Bank
Legal Department
26th floor
1 Chase Manhattan Plaza
New York, NY 10081

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9311

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK
and CHASE MANHATTAN BANK, N.A.,

Defendants-Respondents.

Renewal Motion for Modification of
This Court Order of 10/16/01 to Reinstate the Appeal
Pursuant to FRAP 27(a)(3)(b)

MOTION BY:

JOHN B. BELL
Appellant, Pro Se
3400 Foxcroft Road #115
Miramar, FL 33025
1(954) 447-0217 (Home)
1(954) 961-7209

OPPOSING COUNSEL:

J.P. MORGAN CHASE
LEGAL DEPT.
Attorneys for Chemical
& Chase
One Chase Manhattan Pl.
26th Flr.
New York, New York 10081
1(212) 552-0949

MOTION BY:

OPPOSING COUNSEL:

ATTORNEY GENERAL
STATE OF NEW YORK
120 Broadway – 24th Flr.
New York, New York 10271
1(212) 416-8594/8610

The consent of opposing counsel has neither been sought nor obtained.

The relief herein has not been sought below.

Service of the within motion has been effected by mail.

A previous application for the relief requested herein has been made to this Court.

The requested return date is November 15, 2001

An expedited appeal would be dispositive in this motion.

The Appeal was scheduled by an Order, for September 17, 2001

This Court's Order of October 16, 2001 maintains the status quo.

Brief statement of the relief requested: This is a renewal of the prior motion for modification the Court's Order of October 16, 2001, for reinstatement of the scheduled appeal herein.

/s/ JOHN B. BELL
By:
JOHN B. BELL

/s/ JOHN B. BELL
Appearing for: John B. Bell,
Pro Se

Date: January 20, 2002

ORDER

Before:

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/

Date

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN B. BELL,

Petitioner,

Vs.

THE STATE OF NEW YORK, CHEMICAL BANK
And CHASE MANHATTAN BANK, N.A.,

Respondents.

MOTION PURSUANT TO RULE 30.3 TO EXTEND THE TIME IN WHICH TO FILE A WRIT OF CERTIORARI

The petitioner, pursuant to Rule 30(3), respectfully requests an extension of the time in which to file his writ of certiorari.

Petitioner has not previously been granted, nor denied, the relief sought herein.

Petitioner's affidavit in support of this motion is attached hereto.

/s/ JOHN B. BELL
JOHN B. BELL

AFFIDAVIT IN SUPPORT OF THE MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE A WRIT OF CERTIORARI

I, JOHN B. BELL, am the petitioner in the above-entitled case. In support of my motion for an extension of time, I submit the following facts and circumstances for the Court's consideration:

1. The Writ of Certiorari, to be filed herein, is from an Order of the U.S. Court of Appeals, for the Second Circuit, dated February 21, 2002 (see Appendix A), which denied petitioner's motion for the modification of said Court's Order of October 16, 2001 (see Appendix B), which dismissed an appeal from an Order of the District Court, for the Southern District of New York, dismissing petitioner's Civil Rights action on the ground that same is barred under the Rooker-Feldman Rule (see Appendix C).

2. Petitioner brought the Civil Rights action in the District Court, alleging that his constitutional rights to due process and the equal protection of the law, were violated in a State Court action, captioned *Bell v. New York Higher Education Assistance Corporation*, Chemical Bank and New York Law School, brought in the Supreme Court, New York County (Wilk, J.), and assigned Index No. 28103/83.

3. In the State Court action, petitioner alleged that said Court's finding, that New York Higher Education Assistance Corporation (hereinafter "NYSHESC") was a State agency and therefore entitled to raise the Affirmative Defense of Sovereign Immunity, was not supported in fact or law. Nevertheless said Court, in an Order dated December 4, 1987, dismissed petitioner's action, holding that it

lacked subject matter jurisdiction to hear a case against the State.

4. In 1989, NYSHESC admitted, and the Attorney General corroborated said admission, that it was not, nor have ever been, a State agency when it submitted Departmental Bill #388, asking the New York State Legislature to place it under the Court of Claims Act for money damages suits only. NYSHESC advised the New York State Legislature, in relevant part, that:

> ". . . In a particular recent case involving the state Tuition Assistance Program (TAP) where the corporation took action to halt payments of TAP to the school, it sued the Corporation and others in the U.S. District Court for money damages. Said Court dismissed the action on the grounds that the Corporation was a state agency, asserting it had no jurisdiction. When the Attorney General instituted suit in the New York State Supreme Court on behalf of the Corporation and the state to recover monies back from the school, it counterclaimed for money damages. The court there held that the Corporation was a state agency and the action for money damages would have to be brought in the Court of Claims. However, when the school requested permission of the Court of Claims to file a late claim, that court on its own motion, determined that the Corporation was not an agency of the state and that court had no jurisdiction of the matter. There has been other instances in the past where the position has been taken in the Court of Claims that the Corporation was not a state agency and claims have been dismissed *and in fact one such decision adverse to the Corporations*

position was rendered as recently as September of 1986. . . .". (See Appendix D) (emphases added)

5. These admissions by NYSHESC were corroborated by the Attorney General of the State of New York, in an opinion letter requested by Governor Mario Cuomo wherein he stated, in relevant part, as follows:

". . . Over the past decade, there has been a split in judicial decisions regarding the appropriate court in which to file claims against Higher Education Services Corporation (*New York Higher Education Assistance Corporation's successor*), see, for example, *McAvoy School, Inc. v. Boyle*, unpublished, [Knapp, J., S.D.N.Y. 1980] [barring suit against HESC in federal court and implying Court of Claims would have jurisdiction]; *HESC v. McAvoy Schools, Inc.*, unpublished, [Supreme Ct. Albany Co., Hughes, J., 1983] [Supreme Ct. has no jurisdiction of a counterclaim for money damages against HESC]; *Bell v. HESC*, 138 Misc.2d 932 [Supreme Ct. N.Y. Co., 1987] [Supreme Ct. has no jurisdiction of claim against HESC]; *McAvoy School, Inc. v. State*, unpublished, [Ct. of Claims, Benza, J., filed 4/4/85] [Ct. of Claims has no jurisdiction of a claim for nonpayment of moneys by HESC]; *HESC v. Baker*, 126 Misc.2d 244 [Civil Ct., City of New York, Kings Co., 1984] [implying that that HESC is subject to suit in Supreme Ct.]; and *Brilson v. Control Data Corp.*, unpublished [Supreme Ct. Rensselaer Co., Tavers, J., 1989] [Supreme Ct. does have jurisdiction of a third-party complaint against HESC]. (See Appendix D) (Parenthetical italics and emphases added).

6. The alleged "split in judicial decisions" mentioned by the Attorney General in his letter, never really existed, but was created by the Attorney General failure to follow the law and appeal those decisions that were adverse to NYSHESC's position. The Attorney General appears to have engaged in the type of conduct that this Court condemned in *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S.Ct. 1434, 1442, 28 L.Ed.2d 788 (1971), the repeated litigation of the same issue as long as the supply of unrelated defendants holds out. When the Court of Claims held in *McAvoy School, Inc. v. State*, that NYSHESC was not a State Agency and NYSHESC did not appeal therefrom, it was thereafter precluded from raising that defense, since said issue had already been determined judicially. Of all the cases cited by the Attorney General, only *Bell v. NYSHESC* still holds that NYSHESC is a State agency and that the Supreme Court lacks jurisdiction to hear this case.

7. Predicated upon the foregoing petitioner, pursuant to New York State law, *CPLR*, § 5015, moved the Supreme Court, inter alia, to vacate its Order dismissing the State action on the ground that NYSHESC was a State agency entitled to invoke the State's sovereign immunity. Said motion, and similar motions over the ensuing eleven years, have been similarly denied.

8. Petitioner alleged that his constitutional rights to due process and the equal protection of the law were violated, when the Supreme Court failed and refused to apply New York's Law of Evidence on admissions and vacate its erroneous Order. Petitioner further alleged that his constitutional right to due process was violated, because the Supreme Court's refusal to assume the jurisdiction of this

case imposed upon it by law, left him without a competent legal forum, within the State of New York, with jurisdiction to hear his case against NYSHESC.

9. Petitioner further alleged that 8 NYCRR 2104.4 (eff. 4/12/75-repealed 9/16/96), which the Supreme Court had relied upon in finding that petitioner breached his contract with Chemical Bank, was facially unconstitutional, because it constituted an unlawful exercise of legislative power and exceeded the rule-making authority granted NYSHESC by the New York State Legislature.

10. Pursuant to New York State Law, petitioner served copies of the pleadings raising this constitutional challenge upon the Attorney General of the State of New York. However, the Supreme Court failed and refused to entertain petitioner's challenge to 8 NYCRR 2104.4's constitutionality and failed and refused to require the Attorney General to appear and defend against such a challenge, as is required under New York State's *Executive Law*, §71. As a result thereof, the issue of 8 NYCRR 2104.4 was never adjudicated and therefore, precluded an appeal because New York State's appellate courts may only entertain appeals from orders or judgments of an inferior court. Without an appealable order of judgment, an appellate court lacks jurisdiction to hear an appeal.

11. Petitioner alleged that his constitutional rights to due process and the equal protection of the law were violated, when the said Court refused to adjudicate his challenge to the constitutionality of 8 NYCRR 2104.4 and refused to order the Attorney General to appear and defend said challenge, as required under New York State's *Executive Law*, §71.

12. To prevent further proceedings in *Bell v. NYSHESC*, the Supreme Court granted Chase Manhattan Bank's (Chemical Bank's successor) motion for a permanent injunction, which was joined by NYSHESC (see Appendix E). Chase Manhattan argued that petitioner was barred, under the principles of *res judicata*, from further litigating his claims against the respondents herein. Petitioner opposed the said motion, alleging that such an injunction was unavailable to the respondents as a matter of law.

13. Petitioner alleged that under New York State's Law of Res Judicata, the issuance of such an injunction to Chase Manhattan violated State Law, in that under said law, *res judicata* is not applicable in the same case, nor can any nonfinal order be given a *res judicata* effect. In Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 534, 647 N.E.2d 736 on remand 213 A.D.2d 963, 623 N.Y.S.2d 969, app. and rearg. Den. 1995 WL350085, the New York State Court of Appeals held, in relevant part, that:

> ". . . The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing . . . Nonetheless, a fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action . . . Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant . . .". (Id. At pp. 15-16) (emphases added)

14. Fifty-nine years earlier, in *Bannon v. Bannon*, 270 N.Y. 484, 489 (1936) the New York Court of Appeals established that precedent holding, in relevant part, that:

> ". . . This court has said that it is 'only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. . . . .". (Id. At p. _) (emphases added)

The respondents herein have admitted that there were issues raised subsequent to the Supreme Court's Orders of December 4 and 7, 1987 and therefore, they should not have been heard to argue that said Orders finally determined the action between the parties and should have been given a *res judicata* effect.

15. Petitioner alleged that his rights to due process and the equal protection of the law were violated, when the Supreme Court unlawfully issued the permanent injunction, enjoining petitioner from further litigating his claims against NYSHESC and Chase Manhattan Bank, which denied him a full and fair hearing on said issues. The Court of Appeals of the State of New York never reached these issues, because it dismissed the appeal on the ground that the order appealed from did not finally determine the action within the meaning of New York State's Constitution.

16. Petitioner, in an attempt to get the State of New York to rectify the obvious constitutional violations evidence by the State Court record, petitioned Governor George Pataki for his assistance. After almost four months, Governor Pataki referred my requests to the Office of Court Administration, authorizing said agency to take "ANY ACTION YOU DEEM APPROPRIATE" (see Appendix F) Responding to OCA's acknowledgement of the receipt of my letters to Governor Pataki, petitioner wrote to the Hon. Benjamin Steinberg to assure that all requests made of the Governor were under consideration by OCA (see Appendix G).

17. Petitioner respectfully requests that since the fundamental issues involved in the State Court action are now under consideration by OCA, that petitioner's time in which to file a writ of certiorari be extended, from May 21, 2002 to August 21, 2002, to give OCA sufficient time to make its investigations and To take any action that it may deem appropriate and in conformity with the authority vested in it by Governor Pataki.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 30th day of April, 2002.

/s/ JOHN B. BELL

JOHN B. BELL

Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

(3)

Docket No. 02-607

In The

Supreme Court of the United States

JOHN B. BELL

Petitioner,

v.

STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION FOR A WRIT FOR CERTIORARI

JOHN B. BELL
Petitioner, Pro Se
3400 Foxcroft Road No. 115
Miramar, FL 33025
(954) 447-0217

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RESPONDENTS' ALLEGATION, THAT THE PETITION HEREIN IS BARRED, FINDS NO SUPPORT EITHER IN FACT OR IN LAW.

The opposition to the granting of the writ herein, proffered by the respondents, demonstrates that their res judicata arguments are based on the *erroneous assumption* that petitioner's constitutional challenge to 8 NYCRR §2104.4 (eff. 4/12/77, repealed 8/27/96 and hereinafter referred to as the "Rule") and his allegation that it was unlawfully retroactively applied to his Student Loan Agreement, *constituted two separate proceedings*. The respondents argue that the judgment, entered in the Supreme Court, New York County (hereinafter the "State court"), on the 7th day of December, 1987, finally determined *Bell v. New York Higher Education Assistance Corporation,, et al.*, 138 Misc.2d 936, 526 N.Y.S.2d 319 (Sup.Ct. N.Y. Co. 1987) (hereinafter referred to as the "State action"). However, the State court record is to the contrary, and shows that the State action was the *only lawsuit* between the petitioner and the respondents. This being so, then

neither res judicata nor collateral estoppel is applicable, since res judicata requires that there be two separate proceedings (50 C.J.S. Judgments, §703) and collateral estoppel is not applicable in the same case (50 C.J.S. Judgments, §781).

The respondents' allegation that the judgment and permanent injunction in *Bell v. NYHEAC* constitutes a bar to the instant action, predicated upon the doctrine of *res judicata* and the principles of collateral estoppel, is not supported by the established facts, or by applicable law.

RESPONSIVE ARGUMENTS

I. RESPONDENTS' ARGUMENT, THAT THE INSTANT ACTION WAS PROPERLY DISMISSED UNDER THE ROOKER-FELDMAN RULE, IS UNTENABLE.

Petitioner filed suit in the District Court, alleging that his civil and constitutional rights to Due Process and the Equal Protection of the Law, were violated by the State court's *failure to adjudicate* constitutional issues raised in the State action. This allegation, that the case was brought because the State Court

failed to adjudicate issues raised in *Bell v. NYHEAC, irrefutably* establishes 1) that there is no judgment adjudicating the constitutional raised, and 2) *that there is no state court judgment which the District Court could have been asked to review.*

In the instant action, petitioner alleged that the "Rule", which the State court relied upon in granting the respondents summary judgment dismissing the State action as to them, was *unconstitutional,* on the ground that its promulgation constituted an unlawful exercise of legislative power by New York State Higher Education Services Corporation (NYHEAC's successor and hereinafter referred to as "NYSHESC") and exceeded the rule-making powers granted it by the New York State Legislature. To this very day, no court of the State of New York has ruled upon the constitutionality of the rule, or its unlawful retroactive application to petitioner's Student Loan Agreement.

It is evident from the record herein, that the Complaint filed in the District Court did not require said Court to review any State

court judgment. The fact of the matter is that admittedly, *there is no state court judgment* resolving the issues of the constitutionality of the Rule, and its unlawful retroactive application to petitioner's Student Loan Agreement. The instant case does not seek a review of a state court judgment, but asks only that petitioner's constitutional rights to Due Process and the Equal Protection of the Law be exonerated.

The Rooker-Feldman Rule divested the District Courts of jurisdiction to hear cases seeking the review of a state court judgment and "inextricably intertwined issues related thereto". In the instant case, no such judgment, or issues intertwined with issues determined by a state court exists. Therefore, the District Court erred in dismissing the instant action under the Rooker-Feldman Rule.

II. THE RESPONDENT'S ARGUMENT, THAT FULL FAITH AND CREDIT AND PRINCIPLES OF COMITY ALSO REQUIRES THE DENIAL OF THE INSTANT PETITION, IS ERRONEOUS.

A. The Granting of Full Faith And Credit to the State Court Injunction, Barring Petitioner From Re-litigating The Issues Resolved In Its Order Of December 7, 1987, Would Have No Effect On The Litigation In The Instant Case.

The respondents' argument, that the within Petition is barred under the Full Faith and Credit Clause, and the Rule of Comity, are contrary to law. At page 8 of their Brief, the respondents argue that:

> "Not only the Full Faith and Credit Clause of the Constitution, Article IV, §1, and 28 U.S.C. §1738 (1995 & Supp. 2000) ("State and Territorial Statutes and judicial proceedings; full faith and credit"), but the 'general federal law of res judicata' – *see, e.g., Winters v. Lavine*, 574 F.2d 46, 54-56 (2d Cir. 1978) and principles of comity require that (a) Justice Wilk's 1987 summary judgment decisions and the 1988-1989 affirmances thereof, dismissing

> Bell's claims based on his student loan agreement against Chase and NYSHESC on he merits, and (b) Justice Wilk's 1997 Order barring Bell from further relitigation on res judicata grounds, the Appellate Division's 1998 affirmance thereof, and the New York Court of Appeals' dismissal of he appeal therefrom, be given Full Faith and Credit. ...".

The respondents argue that the Court should give Full Faith and Credit to the State court judgment of December 7, 1987 and the injunction it issued, dated August 15, 1997 and predicated thereon, deny the instant Petition. The judgment of December 7, 1987 has no relevance in the instant case, as none of the issues resolved therein are in controversy here. The Complaint filed in the District Court specifically alleges *that the State court violated petitioner's constitutional rights to Due Process and the Equal Protection of the Law,* by failing to adjudicate issues raised in the State action, subsequent to the judgment of December 7, 1987. *Simply stated, there are no state court judgments involved in the*

instant case, to which a federal court would be required to give Full Faith and Credit or Comity. Whether the said State court judgments were or were not valid, is totally irrelevant in the instant case.

The District Court's dismissal of the instant action, pursuant to the Rooker-Feldman Rule, is not supported by the facts. The Circuit Court dismissal of petitioner's appeal, was improvident and premature, as there are a number of potentially meritorious issues to be adjudicated.

B. The State Court Injunction, Barring Further Litigation Of The Issues Resolved In The State Action On The Ground That Such Re-litigation was barred by *res judicata*, Is Illegal And Unenforceable.

The District Court, in its Order dismissing the action herein, made the State court injunction an issue, when it opined that, "Assuming arguendo that this Court were to find that it did have subject matter jurisdiction over plaintiff's claims... the claims against Chemical Bank and Chase would be precluded

by the doctrine of res judicata." (P. p. A-18-Footnote)

The validity of the State court injunction, must be tested under New York State Law, before a federal court can give it a preclusive effect. *E. D. Systems Corp. v. Southwestern Bell Telephone Co.*, 674 F.2d 453 (C.A. 5th Cir. Tex. 1982); *Ramie v. New York State Dept. of Health*, 741 F.Supp. 68 (S.D.N.Y. 1990). The State court injunction was illegally issued, in that it purports to bar further litigation of the State action, under the doctrine of res judicata. New York State's Law of Res Judicata, requires for its implementation, that there be an identity of issues, an identity of the parties, an earlier proceeding in which the claims sought to be barred were judicially resolved, and that there be a valid final order, adjudicating said issues on the merits.

The injunction lacks two at least two of the required essential elements for res judicata to apply, 1) there is no prior proceeding between the parties in which the issues resolved in the State action were finally

determined, and 2) there is no final valid judgment in which all the issues in the State action, were resolved. Lacking these *res judicata* elements, the defense fails and therefore, District Court erred in stating that it would give said judgment Full Faith and Credit.

Finally, the State court injunction *violated* State Law, which provides that an injunction, enjoining a *pro se* litigant from further litigation in the state courts, is improper *where the injunction does not permit him to institute an action or proceeding with prior judicial approval. People v. Hearse*, 253 A.D.2d 680, 677 N.Y.S.2d 470 (A.D. 1st Dept. 1998); *Spano v. Riley*, 242 A.D.2d 934, 665 N.Y.S.2d 364 (A.D. 4th Dept. 1997); *Lammer v. Lammer*, 235 A.D.2d 286, 652 N.Y.S.2d 288 (A.D. 1st Dept. 1997); *DuBroff v. Norych & Tallis*, 220 A.D.2d 480, 632 N.Y.S.2d 165 (A.D. 2d Dept. 1995).

The injunction herein speaks for itself and evidences that there is no such provision, permitting petitioner to institute an action or proceeding with prior judicial approval,

included therein (Pet. p. A23-A-26.). The injunction therefore is unlawful under State Law and a federal court cannot not give it Full Faith and Credit.

III. THE RESPONDENTS' ARGUMENT, THAT THE PETITION IS SUBJECT TO DENIAL ON COLLATERAL ESTOPPEL GROUNDS, IS FRIVOLOUS.

The respondents argue, at page 18 of their Brief, that the instant petition should be denied, on the ground that petitioner is collaterally estopped from bring it, because of a *"similar type"* §1983 civil right action he brought in 1985.

Collateral Estoppel requires for its application, that there must be an identity of issues (not *"types of cases"*) before its principles can be invoked. 50 C.J.S. Judgments, §781, provides in relevant part, that:

> "...Collateral estoppel requires for its application that there be two separate proceedings; *it does not apply to decisions in the same case.* Where there is only one lawsuit, one trial and one judgment, *the doctrine of*

> *issue preclusion cannot apply.*" (emphases added)

Collateral estoppel is inapplicable in this case because the elements of *identity of issue*, and *two separate proceedings*, are not present. The respondents seek to mask the absence of these elements, by arguing that this Court *vitiated* the requirement of these elements, in its ruling in *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S Ct. 1434, 1442, 28 L. Ed. 2d 788 (1971)(See Res.Br. at pp. 18-19.)

The respondents erroneously argue that:

> "...In *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S Ct. 1434, 1442, 28 L. Ed. 2d 788 (1971), this Court, deciding the 'broader question' of 'whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue', state that permitting repeated litigation *of the same issue* against different defendants 'reflects either an aura of the gaming table or a 'lack of discipline and of

> disinterest on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure" ', quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185, 72 S. Ct. 219, 222, 96 L. Ed. 200 (1952)." (emphases added)

Petitioner's first response to respondents' argument, is that they *lack standing* to raise the defense of collateral estoppel. *John B. Bell v. The State of New York and New York Law School* (hereinafter referred to as the "Law School Case") involved a *Scholarship dispute*, to which the respondents were neither a party, nor privy thereto. The *issues* resolved in the Law School Case are not identical to the issues raised in the instant action.

The respondents' reliance upon Blonder-Tongue Labs, Inc., is misplaced because in the aforesaid case, this Court did nothing more than *modify* the principle of mutuality of estoppel. The Court held that once a factual *issue* is judicially resolved against a plaintiff, he should not be permitted to re-litigate that issue anew each time there is

a different defendant. That once the issue of *fact* is judicially determined, it is determined for all purposes and a subsequent defendant defending against that issue of fact, may raise the defense of collateral estoppel even though he was not a party, or in privity with a party, in the action in which the issue was resolved.

Blonder-Tongue Labs. Inc. did not, as the respondents seem to be arguing, *change* the requirements of collateral estoppel, but expanded the identity of parties requirement, in a very narrow group of cases. The respondents' reliance on *Blonder-Tongue Labs, Inc.*, as their basis for invoking the principles of collateral estoppel to bar this Petition, is patently frivolous.

Additionally, the respondents are *in violation* of the Circuit Court's Order, which specifically prohibits the *use* or *citing* of the Law School case, in any unrelated actions. The *Nota Bene* appended to the Circuit Court's Order, reads as follows:

> "Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, *it shall*

> *not be reported, cited or otherwise used in unrelated cases before this or any other court.*" (Res.Br. at p. R.A.-3) (emphasis added)

The respondents' arguments in support of their assertion that the Petition should be dismissed on the ground of collateral estoppel, *is totally frivolous.*

IV. THE RESPONDENTS' ARGUMENT, THAT THE INSTANT PETITION IS UNTIMELY BECAUSE PETITIONER MISREPRESENED THE TIMING SEQUENCE OF THE CIRCUIT COURT'S RULING, IS REFUTED IN FACT AND IN LAW.

The respondents, at pages 19-23 of their Brief, allege that the Petition herein is untimely, because petitioner made *misrepresentations* to this Court as to the sequence and timing of the Circuit Court's rulings. The respondents argue that the 90-day period, within which time petitioner had to file this Petition, commenced upon the initial decision of the Circuit Court (January 4, 2002) and expired on April 5, 2002. The respondents relied upon the initial portion of subsection 3

of Rule 13 of this Court, which reads as follows:

> "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice).

However, the respondents ignore in their argument, but emphasize in their citing of subsection 3, the following:

> "...But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition of rehearing) *runs from the date of the denial of the petition for rehearing or*, if the petition for rehearing is granted, the subsequent entry of judgment.

Petitioner filed two *timely* petitions for a rehearing, the last of was decided on February 21, 2002. Under Rule 13-3 of this Court's Rule, there is nothing therein which prohibits more than one request for a

rehearing. Where a party timely files for a rehearing, the rule simply states that the time in which to file a writ for certiorari commences upon the date of the petitions denial, or if granted, on the date of the subsequent entry of judgment.

The respondents argument takes the provisions of subsection 3 out of context and attempts to add a *numerical restriction* on the number of timely made petitions for rehearing a party may make. If, within the rules of any lower court, a petition for rehearing is timely made, then part two, of subsection 3 of Rule 13 of this court, is applicable.

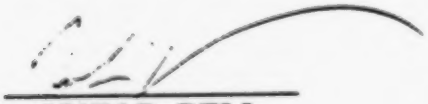
Petitioner respectfully contends that the respondents' timeliness argument is irrational and is inconsistent with Rule 13-3 of the rules of this Court.

CONCLUSION

Predicated upon the foregoing facts and legal arguments set forth in this Reply, and those set forth in the Petition filed herein, the Petition for a Writ of Certiorari should be GRANTED, and petitioner given such other,

fither and different relief as to the Court may seem just and proper in the premises.

Respectfully Submitted,



JOHN B. BELL

Dated: December 13, 2002